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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

767 THIRD AVENUE ASSOCIATES and
SAGE REALTY CORPORATION,

Petitioners,

vs.

PERMANENT MISSION OF THE REPUBLIC
OF ZAIRE TO THE UNITED NATIONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MILTON S. GOULD
Counsel of Record

SHEA & GOULD
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000

Attorneys for Petitioners

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QUESTION PRESENTED FOR REVIEW

Whether an occupant whose lease had long been terminated for chronic non-payment of rent may continue to occupy the property of a private landlord *ad infinitum*, regardless of whether or not that occupant chooses ever again to pay rent, simply because that occupant happens to be a foreign mission to the United Nations?

The Honorable Leonard B. Sand of the United States District Court for the Southern District of New York answered this question, in a case of first impression, in the negative, holding that the contemplated eviction of a non-paying mission, which has bare and wrongful possession of a private landlord's property, does not violate a single principle of international law nor does it contravene the Foreign Sovereign Immunities Act, especially where the contemplated eviction has been preceded by abundant notice. However, the Court of Appeals for the Second Circuit reversed that portion of the District Court's order which directed that the mission vacate the premises which it presently occupies, or be evicted by United States Marshalls, if necessary, for chronic non-payment of rent.

PARTIES TO THE PROCEEDING

Petitioners are 767 Third Avenue Associates and Sage Realty Corporation.[1]

Respondent is the Permanent Mission Of The Republic of Zaire To The United Nations.[2]

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[1] Neither 767 Third Avenue Associates nor Sage Realty Corporation has any parent or subsidiary corporation.

[2] The United States of America, having previously filed a Statement of Interest and several briefs in the District Court on the mission's behalf, submitted an *amicus curiae* brief to the Second Circuit in which it argued, on behalf of the mission, that various treaties and principles of international law preclude the eviction of the mission.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review that part of the decision of the United States Court of Appeals for the Second Circuit, dated March 4, 1993, which reversed that part of a final judgment of the United States District Court for the Southern District of New York which ordered the eviction of a foreign mission to the United Nations from a private landlord's premises, for chronic non-payment of rent, where that mission had no property interest in those premises but only bare and wrongful possession.

OPINIONS BELOW

The opinion of the Second Circuit, dated March 4, 1993, appears in the Appendix at pages A. 1-20. The opinion of the District Court granting the landlord possession of the premises and ordering the United States Marshalls to seize the premises, if necessary, dated March 24, 1992, reported at 787 F. Supp. 389, appears in the Appendix at pages A. 21-36.

JURISDICTION

The decision of the Second Circuit was made on March 4, 1993. This Court has jurisdiction to review the decision of the Second Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

The Second Circuit asserts that Articles 22(1), 22(2) and 22(3) of the Vienna Convention On Diplomatic Relations of April 18, 1961, 23 U.S.T. 3227 (the "Vienna Convention"), preclude the contemplated eviction. Petitioners' argument that the contemplated eviction is in fact proper and warranted, under the particular circumstances of this case, is based, in part, on Sections 1603(d), 1605, 1609 and 1610 of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603(d), 1605, 1609 and 1610. These treaty and statutory provisions are set forth at pages A. 79-81 of the Appendix.

STATEMENT OF THE CASE

A. History Of The Parties' Landlord-Tenant Relationship

The facts in this lawsuit are undisputed. Petitioner 767 Third Avenue Associates is a partnership which owns the building known as 767 Third Avenue, New York, New York (the "Building"). (JA 29).[3] Petitioner Sage Realty Corporation ("Sage")

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[3] References in the form "JA" followed by a page number are to the Joint Appendix to the Second Circuit. References to the Compilation Of International Authorities submitted by the United States will be in the form "CA" followed by a page number.

is the managing agent for the Building. *Id.* On May 19, 1982, Sage, as agent, entered into a written lease (the "Lease") with the Permanent Mission of the Republic of Zaire to the United Nations (the "Mission"), for a term of ten years and one month, commencing on June 21, 1982, for the entire 25th floor of the Building (the "Premises"). (JA 29-30). The Mission remains in possession of the Premises to this date. (JA 30).

1. *Termination of the Lease.*

The Lease would have expired by its terms on July 21, 1992. In or about October, 1987, however, petitioners commenced an action against the Mission after it had failed to make monthly rent payments for more than seven months. On or about August 22, 1989, Judge Sand signed a Judgment and Order (the "1989 Judgment"), which terminated the Lease and all of the Mission's rights under the Lease, awarded possession of the Premises to petitioners, and awarded petitioners damages in the sum of $244,157.49, including costs and attorneys' fees. (JA 91-92; A. 37-38). After entry of the 1989 Judgment, the Mission paid petitioners the full amount of damages awarded by Judge Sand, and with petitioners' consent, remained in possession *as a month-to-month tenant*, without a written lease, paying monthly use and occupancy in the fixed amount of $19,350 per month, together with additional monthly expenses, including electric charges, taxes on electric use and porter's fees. (JA 30-31).

2. *Termination of the month-to-month tenancy.*

The Mission and petitioners once again appeared before Judge Sand in 1991 after the Mission had fallen into serious default for a second time. (JA 31).[4] That is, despite repeated demands, the Mission had failed to pay the agreed upon use and occupancy to petitioners for well over one year, indeed, since August 1990. (JA 31).

After its repeated demands had been ignored, Sage had notified the Mission by letter, dated April 26, 1991, that

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[4] The District Court's basis for jurisdiction was 28 U.S.C. §§ 1330(a) and 1603(a).

petitioners had elected to terminate the Mission's month-to-month tenancy as of May 31, 1991, due to the Mission's failure to cure its arrears. (JA 31). Despite its receipt of the April 26, 1991 termination letter, the Mission failed to cure its default. *Id.* Thereafter, by filing a complaint, dated July 22, 1991, petitioners commenced the present action to recover the amounts owed and to regain possession of the Premises. *Id.* Because the Mission had never contested that it owed the amounts sought by petitioners, petitioners filed a motion for summary judgment on October 16, 1991. (JA 28-98).

B. The Orders And Opinions Of The District Court

On November 7, 1991, with the Mission's default continuing, petitioners' summary judgment motion was argued before Judge Sand. (JA 109-119; A. 55-61). In ruling from the bench, Judge Sand held, *inter alia*, that the eviction of a tenant in wrongful possession was not the kind of relief which the Foreign Sovereign Immunities Act ("FSIA") sought to preclude in making missions immune from "execution and attachment." (JA 118-119; A. 61).

1. *The November 14, 1991 Order.*

On November 14, 1991, Judge Sand signed an Order and Judgment which effectively resolved all issues between the parties on the merits, leaving nothing for the District Court to do but to enforce by execution what had been ordered. (JA 120-121; A. 39-40). In particular, by this Order and Judgment, Judge Sand (a) awarded petitioners damages in the amount of $387,154.72 through October 31, 1991, plus damages of $832.19 for every day from November 1, 1991 until the Mission vacated the Premises, (b) directed the Mission to vacate the Premises, and (c) directed the United States Marshall to remove the Mission from the Premises in the event the Mission refused to depart. (JA121; A. 40).[5] The only thing which this Order and Judgment

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[5] The portion of this Order and Judgment which directs the United States Marshall to remove the Mission from the Premises will be referred to as the "Eviction Order."

did not specify was the date by which the Mission was to vacate the Premises.

2. *The Supplemental Order.*

This latter issue was addressed in Judge Sand's Supplemental Order of January 15, 1992, which was identical to the previous Order and Judgment, except that it provided a January 31, 1992 deadline for the Mission to vacate the Premises. (JA 122-123; A. 41-42).

Nonetheless, the Mission failed to vacate the Premises, and by letter dated January 29, 1992, the Mission's counsel sought a stay of Judge Sand's Supplemental Order requiring it to vacate the Premises by January 31, 1992, pending its appeal to the Second Circuit. Judge Sand granted a temporary stay and directed the parties and the United States to more fully brief the issue of diplomatic immunity from eviction.

3. *Judge Sand's March 24, 1992 Opinion.*

Petitioners argued that a stay was not warranted because the United States and the Mission (referred to as "movants" for purposes of this section only) had: (1) failed to show likelihood of success on the merits; (2) failed to show irreparable harm in the absence of a stay; (3) failed to show that petitioners would not be substantially injured by a stay; and (4) failed to show that a stay was in the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *United States v. Eastern Airlines, Inc.*, 923 F.2d 241, 244 (2d Cir. 1991).

On March 24, 1992, Judge Sand issued his opinion denying movants' request for a stay pending appeal but granting a more limited stay until April 20, 1992, in order to allow the Mission to vacate the Premises in an orderly manner, thereby ensuring that the confidentiality of its papers and the privacy of its members not be compromised. (787 F. Supp. at 397; A. 35-36). With respect to the first factor, likelihood of success on the merits, Judge Sand held that neither the various treaties which

the United States has ratified, nor the Foreign Sovereign Immunities Act ("FSIA"), provided any support whatsoever for movants' contention that, in essence, a private landlord can be compelled to host a non-paying occupant *ad infinitum*, simply because that occupant is a foreign mission. (787 F. Supp. at 392-395; A. 26-31).

Judge Sand also rejected movants' claim of irreparable injury in the absence of a stay because the Mission had made no showing that the Premises were unique and had, despite abundant notice, "fail[ed] to seek alternative housing arrangements during the pendency of this action. . . ." (787 F. Supp. at 395; A. 31-32). Furthermore, Judge Sand rejected movants' contention that a stay would not impose substantial harm on petitioners, especially in view of the refusal by the United States "to insure collectibility in response to [Judge Sand's] questions at oral argument." (787 F. Supp. at 396; A. 33).

Finally, with respect to movants' entirely self-serving prediction that an eviction would cause international repercussions, and that it would somehow violate governmental obligations under international law, Judge Sand found that it would be manifestly inequitable to impose the entire burden of the executive branch's asserted foreign policy objectives "on the shoulders of a single private landlord." (787 F. Supp. at 396; A. 33). As Judge Sand stated, "any other conclusion would raise a serious issue as to whether Plaintiffs [petitioners] had been subjected to an unconstitutional 'taking' under the Fifth Amendment." (787 F. Supp. at 396; A. 34).

C. The Opinion of the Second Circuit

On appeal, the United States Circuit Court for the Second Circuit reversed the Eviction Order while affirming that portion of the District Court's order awarding petitioners money damages for rent arrears.[6] (A. 20).

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[6] Of course, by virtue of provisions of the FSIA, petitioners have no way of collecting this judgment since they may not seize bank accounts or any other assets of the Mission.

In so holding, the Second Circuit, at the very outset, conceded that it felt compelled to sacrifice a landlord's "common law right to obtain possession of its premises" for rental arrears, based on its fear that the lives and property of American diplomats abroad might be placed at risk were it to hold otherwise. (A. 3). In particular, the Second Circuit stated:

> That possibility weighs so heavily on the scales of justice that it militates against enforcement of the landlord's right to obtain possession of its property for rental arrears.

Id. However, it is entirely speculative to suggest that the act of returning property to its rightful owner will somehow incite terrorist elements to attack American diplomats abroad.[7] Clearly, those who are already pre-disposed to the use of terror do not feel a need to find, nor will they seek, any justification to excuse their violent acts. However, the Second Circuit, having made this unjustified policy concern its fundamental guiding principle, then strained to find support for its decision in the Vienna Convention and among general principles of international law, where none exists, with respect to the narrow issue presently before the Court. In addition, the Second Circuit simply accepted the United States' argument at face value, that such a decision is mandated by public policy, apparently abdicating its responsibility to look into the issue: "[t]he most secure way to guarantee this protection, *the United States tells us*, is through blanket immunities and privileges without exception." (emphasis added) (A. 14).

Furthermore, the Second Circuit's decision rests, in large part, on its clear misapprehension that "to date, diplomatic efforts and pressure have proven extraordinarily successful at getting Zaire to pay the judgment [of the District Court] for its back rent." (A. 19). This conclusion is completely undermined by the fact that the Mission did not begin to pay its arrears – despite

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[7] This is especially so in the instant case where the contemplated eviction was preceded by such ample notice that the privacy of Mission members and the confidentiality of Mission papers could not possibly be compromised.

eight months of State Department pressure — until *shortly after* Judge Sand issued his March 24, 1992 opinion. It was only Judge Sand's denial of the Mission's request for a stay pending appeal beyond April 20, 1992, and thus the prospect of eviction, which prompted the Mission to begin paying its arrears. Tellingly, the first payment was received approximately one week before the scheduled eviction.[5] This critical fact should have led the Second Circuit to the inescapable conclusion that until the Mission was faced with an actual and imminent eviction, it did not view its rent arrears as a responsibility despite "diplomatic efforts and pressure". In fact, now that the Mission no longer faces the threat of eviction, it has again fallen into serious arrears, for yet a third time, and owes petitioners $260,031.46.

Moreover, "diplomatic pressure" is entirely within the discretion of the executive branch. Therefore, private landlords, standing in petitioners' shoes, would find themselves without any avenue to seek redress whenever the executive branch decides that exerting such pressure would not be in the best interests of United States foreign policy. Without an enforceable order of eviction, petitioners would be deprived of their only meaningful legal remedy to recover possession of the Premises. Therefore, the Second Circuit's decision would preclude petitioners from ever recovering possession of the Premises in the event that the Mission chooses to remain in the Premises forever without paying any rent.

REASONS FOR GRANTING THE WRIT

This case involves an important issue of statutory and treaty interpretation under, respectively, the FSIA and the Vienna Convention. This petition should be granted to allow the Court to examine a decision, in a case of first impression, which, *inter alia*, eviscerates one of the fundamental purposes of the FSIA. Although the Second Circuit apparently recognizes that one of

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[5] The Mission had remitted checks to petitioners on April 9, April 23, and April 27, 1992, in the total amount of approximately $395,000. Meanwhile, petitioners had consented to additional extensions of Judge Sand's limited stay pending appeal, and the parties had stipulated that enforcement of the Eviction Order would be stayed pending determination of the appeal.

the main purposes of the FSIA was to ensure that determinations of immunity be made by the judiciary rather than by the executive branch, its decision is simply inconsistent with that stated purpose. Under the Second Circuit's decision, the *practical* determination of whether a foreign government has immunity will still be made by the executive branch.

This petition should also be granted because the Second Circuit based its decision on a wholly speculative and misguided fear that affirmance of the Eviction Order might result in potential risks to American diplomats abroad. Although the Second Circuit acknowledged that the District Court had correctly concluded that "the notion of protection from eviction from privately owned leased premises was not specifically addressed by any of the [cited] treaties," it proceeded to infer such protections from the Vienna Convention and various general, but inapplicable, principles of international law embodied therein. In effect, the Second Circuit has taken it upon itself to expand the reach of the Vienna Convention beyond that contemplated by its drafters, by unwisely translating the general principle of mission inviolability into an air-tight doctrine of "absolute inviolability" which tolerates no exceptions whatsoever. Therefore, its decision, driven solely by perceived public policy concerns set forth by the United States, lacks any basis in law.

Furthermore, this petition should be granted to allow the Court to resolve the uncertainty and confusion stemming from the conflicting and inconsistent positions taken by the United States with respect to the issue of inviolability of missions and consulates. Although the Second Circuit asserts that "[t]he United States has consistently respected the complete inviolability of missions and consulates" (A. 16), the United States has recently disregarded this purported principle of "complete inviolability." In particular, in May 1992, the United States precipitously and unexpectedly closed the Consulate General of the Socialist Federal Republic of Yugoslavia (the "Consulate"), and a branch of the Consulate, the Yugoslav Press and Cultural Center (the "Cultural Center"), together with the Yugoslav Chamber of Economy, all of which were located in New York City at 767 Third Avenue, the same building in which the

Mission is occupying space. In fact, on or about May 25, 1992, the Department of State notified the Consulate and the Cultural Center that they were to terminate their New York City operations by May 31, 1992. In addition, principal officers and military attachés were directed to depart the United States no later than midnight May 31, 1992. *See* Amended Complaint ¶¶ 18, 19, dated August 3, 1992, in *767 Third Avenue Associates and Sage Realty Corp.* v. *The United States of America*, United States Court of Federal Claims, Civil Action No. 92-398L (J. Moody Tidwell). (A. 51-52).

This petition should also be granted to allow the Court to review the wisdom of a decision which allows a foreign mission to the United Nations, whose lease has been terminated for chronic non-payment of rent, to continue to occupy the property of a private landlord for as long as it alone deems appropriate and convenient. Under the Second Circuit's "full inviolability" theory, a mission, with bare and wrongful possession of a private landlord's premises, would be allowed to remain in those premises *ad infinitum*, whether or not it chose ever again to make any rent payments. The Second Circuit takes the extreme position that, if the Mission had a tenancy pursuant to a one-year lease, at the expiration of that period, the Mission could not be evicted and could stay for a thousand years if it so desired, even if it chose to pay no rent. Indeed, the same result would presumably be required even if the Mission's possession were wrongful from the outset, e.g., if the Mission had taken possession by force, or by "squatting" in the Premises.[9] Petitioners respectfully submit that such a confiscatory result would be particularly inequitable in view of the United States' refusal to guarantee collectibility of the judgment when this issue was raised at oral argument by Judge Sand. (JA 125e; A. 65).

Finally, if permitted to stand, the Second Circuit's decision will have harmful consequences far beyond its impact on

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[9] In fact, the Mission is a squatter at this point since the Lease was terminated in 1989 for non-payment and its month-to-month tenancy was terminated in 1991. Moreover, had the Lease still been in effect, it would have terminated on July 21, 1992, by its own terms.

petitioners. In particular, such a decision will undoubtedly create a significant chilling effect on the willingness of landlords in New York City, and other major American cities, to rent premises to foreign missions, thereby impeding, if not totally frustrating, the ability of such missions to secure the necessary space to carry out their vital functions.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO REVIEW THAT PORTION OF THE SECOND CIRCUIT'S DECISION WHICH CONTRAVENES THE FOREIGN SOVEREIGN IMMUNITIES ACT AND IS UNSUPPORTED BY A SINGLE PRINCIPLE OF INTERNATIONAL LAW

A. The Foreign Sovereign Immunities Act Confirms The Judicial Branch's Power To Evict The Mission From the Premises.

As set forth above, that portion of the Second Circuit's decision which overturns the Eviction Order, contravenes the FSIA, which was intended, *inter alia*, to allow the courts, and not the executive branch, to make immunity determinations.

1. *The legislative history of the FSIA shows that the foreign state is not immune in landlord/tenant disputes.*

Nothing in the legislative history of the FSIA suggests that the foreign state is immune in a landlord/tenant dispute. In the House Report on the Act, No.94-1487, the Committee stated, with respect to § 1610(a)(4) of the proposed act:

> Paragraph (4) would deny immunity from execution against *property of* a foreign state which is used for a commercial activity in the United States and is either *acquired* by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. (emphasis added).

U.S. Code Cong. & Admin. News 1976 at 6628. The critical terms in this passage are "*property of*" and "*acquired.*" The FSIA immunity from execution and attachment of a foreign state's property clearly applies to "*property of [the] foreign state,*" and "*property acquired*" by the foreign state. No evidence exists to suggest that a leasehold interest – or, more to the point, mere naked possession – was ever intended to fall within the meaning of "property," as that term is used in § 1610(a)(4) of the FSIA.

In fact, the only allusion to a landlord/tenant relationship in the FSIA, or in its legislative history, explicitly grants the courts jurisdiction to decide disputes arising from such a relationship. Section 1603(d) of the FSIA defines "commercial activities" which, under Section 1605 of the Act, are an exception to the immunity of the foreign state. In the legislative history on this section, the House Report states:

> The courts would have a great deal of latitude in determining what is a "commercial activity" for the purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, *its leasing of property*, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition. (emphasis added).

U.S. Code Cong. & Admin. News 1976 at 6615.

Thus, the only allusion to the leasing of property in the FSIA or its legislative history treats that activity as a primary example of an act for which the foreign state would have no immunity. It is key to the present petition to note that the Second Circuit has abdicated its authority to deal with these issues and has simply taken at face value the assertion of the United States that a contrary decision would violate public policy, thereby once again lodging in the executive branch the unlimited authority to determine when immunity attaches, which authority was specifically given to the judicial branch under the FSIA.

2. *The scope and purpose of the FSIA.*

The legislative history of the FSIA clearly sets forth the Act's purposes: (1) codifying the principle of sovereign immunity; *(2) ensuring that the determination of immunity be made by the courts rather than by the executive branch*; (3) providing a procedure for service upon the foreign state; and *(4) providing remedies for plaintiffs who obtain judgments against foreign states. H.R. Rep. No. 94-1487, U.S. Code Cong. & Admin. News 1976 at 6604. See also Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358, 361 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985). *The Second Circuit's decision clearly frustrates two of these stated purposes.*

Prior to the FSIA, determinations of immunity from suit were made on an *ad hoc* basis by the executive branch.[10] The FSIA was intended to transfer the determination of immunity to the judicial branch. As to this purpose, Congress stated:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

U.S. Code Cong. & Admin. News 1976 at 6606. The Second Circuit's overturning of the Eviction Order flies directly in the face of this stated purpose. Here, while the Second Circuit apparently believes that it may decide whether the foreign state is immune from suit,[11] it has, in effect, taken the position that only the

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[10] If the Second Circuit's decision is allowed to stand, these determinations will continue to be made on an *ad hoc* basis by the executive branch and litigants, such as petitioners, will be denied due process as decisions affecting their property will be made purely on foreign policy grounds instead of on legal grounds.

[11] In fact, during the February 3, 1992 hearing before Judge Sand, the United States and the Mission conceded that courts may decide whether the foreign state is immune from suit. (JA 125d-125e, 125g, 125s; A. 64-66, 74).

executive branch, through diplomatic and political channels, can provide a remedy. (A. 19). Thus, under its interpretation, the *practical* determination of whether a foreign government has immunity will still be made by the executive branch.

With respect to the fourth purpose of the FSIA, provision of remedies, the legislative history states that the Act sought to "remedy, in part, the present predicament of a plaintiff who obtained a judgment against a foreign state." U.S. Code Cong. & Admin. News 1976 at 6606. The FSIA was designed to provide congruence between the granting of jurisdiction and the provision of remedies. It is clearly not intended to give the courts jurisdiction to render unenforceable judgments. Congress stated:

> Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

U.S. Code Cong. & Admin. News 1976 at 6606. Congress was therefore striving to provide relief to claimants against foreign states, even in a situation more extreme than that found here, where no property *owned by* the foreign state will be seized and sold. The Second Circuit's decision is simply inconsistent with the FSIA's stated aims. It seems quite unlikely that Congress intended to sanction the attachment and sale of a foreign state's own property, in various situations,[12] but to prevent a private citizen from being restored to possession of its own property being wrongfully withheld by a non-paying foreign state.

Nonetheless, despite the clearly dispositive effect of the FSIA in the instant case, the Second Circuit summarily rejects its

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[12] *See* U.S. Code Cong. & Admin. News 1976 at 6628.

applicability based on § 1609 of the FSIA, which states that the Act operates "[s]ubject to existing international agreements to which the United States is a party." (A.6). In so doing, it relies exclusively on the Vienna Convention, and on various long-standing principles of international law embodied therein, which it claims support respondents' theory of "absolute" or "full inviolability."[13] However, as set forth below, the Second Circuit has not, nor can it, identify a single specific principle of international law to support this theory.

B. The Vienna Convention On Diplomatic Relations Does Not Preclude The Mission's Eviction.

The Second Circuit has improvidently expanded the general principle of mission inviolability into a sweeping and all-encompassing theory of "absolute" and "full inviolability", which tolerates no exceptions. However, despite its thorough textual and historical analysis of the Vienna Convention, it has been unable to identify a single provision of the Vienna Convention which would bar the eviction of a non-paying tenant mission which, like the Mission, has received ample notice of the eviction and has therefore been afforded a full opportunity to protect itself, by, *inter alia*, finding other premises, from any breach of security which it might otherwise suffer.

1. *The Second Circuit's textual and historical analysis of the Vienna Convention is flawed.*

Despite the Second Circuit's policy driven conclusion to the contrary, Articles 22(1) and 22(2) of the Vienna Convention do not preclude the Mission's eviction. In particular, Article 22 states that:

> 1. *The premises of the mission shall be inviolable.* The agents of the receiving State may not enter

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[13] The Second Circuit apparently agrees with petitioners that the United States' reliance on the Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, 21 U.S.T. 1418 and on the United Nations Charter, 59 Stat 1031 (1945), is misplaced as it states that these treaties "shed little light on the immunities granted a permanent mission." (A. 8).

them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect *the premises of the mission* against any *intrusion* or *damage* and to prevent any *disturbance* of the *peace* of the mission or impairment of its dignity. (emphasis added).

* * *

23 U.S.T. at 3237-3238. (A. 81).

Therefore, the very language of Article 22 suggests that it was intended to protect mission premises, owned by foreign governments, only from violent and/or unannounced intrusions or break-ins.[14]

In addition, the Department of State's article-by-article analysis of the Vienna Convention, which was made part of the relevant Senate hearing,[15] states that Article 22 was intended to codify "various immunities granted under customary international law" with respect to "*property owned by a foreign government*" which is "used for diplomatic purposes." (emphasis added) (see Senate Hearing at 49). There is no indication whatsoever in the legislative history that the Vienna Convention was ever intended to allow a mission to occupy a private party's property rent free *ad infinitum*.

In fact, the legislative history strongly supports petitioners' position that Article 22 was intended solely to promote the protection of mission premises from violent attacks and/or

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[14] The Second Circuit's reliance on Article 22(3) is inapposite as that section clearly seeks to protect *mission property* from "search, requisition, attachment or execution." 23 U.S.T. at 3238. (A. 81).

[15] *See* The Vienna Convention on Diplomatic Relations, Hearing Before The Subcomm. Of The Committee On Foreign Relations, 88th Cong., 1st Sess. 1 (1965) ("Senate Hearing"). Mr. Leonard Meeker served as the principal witness for the Department of State at this hearing.

unannounced intrusions, and not to prevent an aggrieved landlord from regaining possession of his property in an orderly and lawful manner through judicial proceedings. For example, in discussing Article 22 during the Senate Hearing, Senator Church did so in the context of an embassy potentially seeking damages from the World Court after having been attacked and seriously damaged by an unruly mob. In response, Mr. Meeker opined that such relief would probably not be necessary because "our experience has been that the host country a day or two after the riot takes place not only offers to but does begin the job of repair and reconstruction." (*See* Senate Hearing at 32-33).

Furthermore, this Court, in discussing this Nation's obligations under international law, and in particular under Article 22 of the Vienna Convention, has made it quite clear that Congress' main concern in this area has long been to protect mission premises, and especially diplomatic personnel, from mob violence. *Boos v. Barry*, 485 U.S. 312, 323-325 (1988). In particular, the Supreme Court stated that:

> The need to protect diplomats is grounded in our Nation's important interest in international relations. . . . Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials.

Id. at 323-324.

Perhaps most significantly, the United Nations General Assembly, at a December 3, 1986 plenary meeting, adopted a resolution entitled "Twenty-fifth anniversary of the Vienna Convention on Diplomatic Relations," in which it emphasized the fact that the paramount concern of the drafters of this treaty was to protect diplomatic missions and their representatives from violence resulting from "terrorist acts committed against diplomatic missions and [their] representatives. . . ." In particular, this resolution "urge[d] all States to take effective action at national and international levels *to suppress terrorist and other acts of violence* against diplomatic missions and representatives, to prosecute without delay the perpetrators of such

acts. . . ." (emphasis added) G.A. Res. 41/79, U.N. GAOR, 41st Sess., Supp. No. 53, at 261, U.N. Doc. A/41/53 (1987). (JA 164).[16]

In attempting to find support for its unduly expansive reading of the Vienna Convention that a mission cannot be entered for any purpose whatsoever without consent, the Second Circuit relies on the United States' analysis of various exceptions to the general principle of immunity which had been considered, and ultimately rejected, by the drafters of the Vienna Convention. However, in so doing, the Second Circuit failed to take into account the following important factual distinction between those situations and the instant case: the proposed exceptions dealt only with situations of extreme emergency and force majeure,[17] which would necessarily require the sudden and unannounced entry of mission premises. Any such immediate and unexpected entry would obviously jeopardize the ability of a mission to protect itself against potential security breaches. However, the District Court recognized that these concerns are not present in this case:

> JUDGE SAND: The Mission has not only had ample time to avoid a non-consensual entry by vacating voluntarily, therefore, but any entry at this point will have been preceded by so much notice that the

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[16] Similarly, at the very same plenary meeting, the United Nations General Assembly adopted another resolution which was obviously prompted by the same concerns, as that body was deeply "*[a]larmed by the increase of acts of violence* against diplomatic and consular officials, as well as against representatives to international intergovernmental organizations and officials of such organizations, which endanger or take innocent lives. . . ." (emphasis added) G.A. Res. 41/78, U.N. GAOR, 41st Sess., Supp. No. 53, at 260, U.N. Doc. A/41/53 (1987). (JA 163).

[17] *See*, for example, Diplomatic Intercourse and Immunities: Projet de codification du droit relatif aux relations et immunites diplomatiques, U.N. Doc. A/CN. 4/91, [1955] II Y.B. Int'l L. Comm'n 9, 11, art. 12(1) (CA 4), in which the proposed exception was intended to apply to cases of *extreme emergencies* threatening " 'grave and imminent risks to human life, the property or health of the public or . . . the security of the State.' "

> privacy of Mission members or secrecy of Mission papers could not possibly be threatened. (footnote omitted)

(787 F. Supp. at 395; A. 30-31).[18]

In sum, nothing in the language or history of the Vienna Convention suggests that it was ever intended to prevent a landlord from recovering its own property from a diplomatic mission which has long ignored its contractual and legal obligations.

2. *Principles of customary international law codified in the Vienna Convention do not support the Second Circuit's expansive interpretation of mission inviolability.*

Although petitioners agree with the general proposition that the drafters of the Vienna Convention sought to codify long-standing principles of customary international law concerning diplomatic privileges and immunities, petitioners disagree that such principles support the Second Circuit's reversal of the Eviction Order. In fact, the Second Circuit's historical analysis of the underpinnings of the Vienna Convention itself underscores the fact that the paramount concern in this area has always been the protection of the persons of ambassadors and consuls. As the Second Circuit observed, "[a]mong the laws of nations is the notion that ambassadors [and consuls] must be received and that they must suffer no harm", which notion represents a fundamental necessity of international relations. (A. 10). This essential principle of international law, which clearly seeks to protect *the person* of diplomatic agents, is in no way compromised by Judge Sand's Eviction Order.

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[18] Judge Sand emphasized the importance of this crucial finding of fact in the final paragraph of his Opinion:

> JUDGE SAND: [O]ur view of the merits has been influenced by the Mission's abundant notice of the eviction and corresponding ability to protect itself against any breach of security that it might engender.

(787 F. Supp. at 397; A. 35).

In addition, the Second Circuit's position that simply because the Vienna Convention codified long-standing principles of customary international law, it somehow "supports the view that the Convention recognized no exceptions to mission inviolability," lacks any textual support. The Second Circuit was unable, as was the United States, to identify a single source which undermines petitioners' contention that no principle of customary international law, or the Vienna Convention, was ever intended to provide support for the type of inequitable and confiscatory result which the Second Circuit's decision imposes on a single private landlord.

C. Petitioners' Only Meaningful Remedy Is Recovery Of The Premises.

Finally, we address the Second Circuit's suggestion that, in the future, other landlords may wish to take certain precautions to avoid the imposition of the confiscatory burdens which its decision would otherwise impose upon them. (A. 20). Although some landlords might be able to obtain security in the form of letters of credit, guaranteeing payment of rent, such security would only be of limited usefulness. This is the case because the Second Circuit's decision grants possession to a foreign mission *ad infinitum* so that at some point the security provided by a letter of credit would be exhausted. Further, Judge Sand recognized that even letters of credit which extend over the stated term of the lease would be of limited comfort to landlords, and would have a significant chilling effect on this segment of the real estate market:

> they [letters of credit] would clearly afford insufficient protection against a diplomatic tenant who wrongfully remains in possession after the lease has expired. The cost of a letter of credit which sought meaningfully to protect the landlord would be considerable, and such cost would of course be borne by the tenant.

(787 F. Supp. at 397; A. 34).[19] Clearly, the only meaningful remedy for landlords who find themselves in petitioners' unenviable position, is to obtain the recovery of their premises.

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[19] Judge Sand also recognized that any attempt to require a waiver of sovereign immunity in the lease itself "is also subject to significant limitations. . . ."

(Footnote continued)

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review that portion of the Second Circuit's decision which reversed the District Court's Eviction Order. Petitioners respectfully submit that if the United States' predictions of international repercussions are as ominous as they now assert, then surely it has both the responsibility and ability to distribute the burden of its foreign policy objectives in a far more equitable fashion than it has proposed to date.

Respectfully submitted,

MILTON S. GOULD
SHEA & GOULD
Attorneys for Petitioners
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 827-3000

Of Counsel:

ROBERT J. WARD
JEAN-MARIE L. ATAMIAN

(787 F. Supp. at 397; A. 34). Also, under the Second Circuit's opinion, waiver of immunity under the FSIA would have no practical effect since it is the Vienna Convention which presumably provides the inviolability found by the Second Circuit.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 61—August Term 1992

(Argued September 4, 1992 Decided March 3-4, 1993)

Docket No. 92-7184

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767 THIRD AVENUE ASSOCIATES and
SAGE REALTY CORPORATION,

Plaintiffs-Appellees,

—v.—

PERMANENT MISSION OF THE REPUBLIC OF ZAIRE
TO THE UNITED NATIONS,

Defendant-Appellant.

Before:

FEINBERG, NEWMAN and CARDAMONE,
Circuit Judges.

The Permanent Mission of the Republic of Zaire to the United Nations appeals from an order and judgment dated January 15, 1992 in the United States District Court for

the Southern District of New York (Sand, J.) granting the motion by plaintiffs, 767 Third Avenue Associates and Sage Realty Corporation, for summary judgment, awarding plaintiffs immediate possession of premises located at 767 Third Avenue in New York City, ordering U.S. Marshals to physically remove appellant and its property from the premises if it fails to vacate, and awarding monetary damages to plaintiffs.

Affirmed, in part, and reversed, in part.

JEFFREY M. RUBIN, New York, New York (Rubin & Shang, New York, New York, of counsel), *for Appellant*.

JOSEPH FERRARO, New York, New York (Robert J. Ward, Jean-Marie L. Atamian, Shea & Gould, New York, New York, of counsel), *for Appellee*.

M. CHINTA GASTON, Assistant United States Attorney, New York, New York (Otto G. Obermaier, United States Attorney, James L. Cott, Assistant United States Attorney, Southern District of New York, New York, New York; Edwin D. Williamson, Legal Adviser, Bruce Rashkow, Assistant Legal Adviser, Richard K. Lahne, Attorney Adviser—Department of State, of counsel), *for the United States of America as Amicus Curiae*.

CARDAMONE, *Circuit Judge*:

This appeal emerges out of a landlord-tenant dispute. When the Zaire mission to the United Nations occupying leased space on the east side of midtown Manhattan repeatedly fell into arrears on its rent, it was sued by its landlord. The tenant's defense against being evicted was diplomatic immunity. A district court refused to credit this defense and instead granted summary judgment to the landlord for back rent and also awarded it possession of the premises, ordering United States Marshals to remove the Mission physically if it failed to vacate in a timely manner.

Enforcement of an owner's common law right to obtain possession of its premises upon the tenant's non-payment of rent may not override an established rule of international law. Nor under the guise of local concepts of fairness may a court upset international treaty provisions to which the United States is a party. The reason for this is not a blind adherence to a rule of law in an international treaty, uncaring of justice at home, but that by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled. That possibility weighs so heavily on the scales of justice that it militates against enforcement of the landlord's right to obtain possession of its property for rental arrears.

BACKGROUND

Plaintiffs, 767 Third Avenue Associates, are a partnership owning a building at 767 Third Avenue in Manhattan, and its managing agent, Sage Realty (collectively plaintiffs, landlord or Sage Realty). The defendant is the

Permanent United Nations Mission of the Republic of Zaire (Mission, Zaire, tenant or appellant), a tenant in the building. The landlord-tenant relationship began on May 19, 1982 when Sage Realty and Zaire entered into a ten-year lease for all of the 25th floor at 767 Third Avenue. The building is conveniently located near the United Nations Headquarters in New York City. In 1987 a dispute arose when Zaire failed to make its rental payments. Sage Realty sued and obtained a default judgment in August 1989 terminating Zaire's lease. Under the judgment plaintiffs were awarded possession and $244,157.49 in damages. After Zaire paid the damage award, plaintiffs allowed it to continue in the premises on a month-to-month basis at a rental of $19,350 per month.

When in 1991 the Mission again defaulted in its rental payments, plaintiffs notified it on April 26 that they were terminating the mission's month-to-month tenancy. On July 22 the landlord sued Zaire in the Southern District seeking unpaid rent, attorneys' fees and possession. On November 14, 1991 the district court granted plaintiffs summary judgment, directed the Mission to vacate the premises, and awarded plaintiffs damages of $387,154.72 through October 31 and $832.19 for each day after November 1, 1991 that the Mission occupied the premises. In addition the district court directed the U.S. Marshal to remove the Mission if it refused to vacate the 767 Third Avenue space. Because the order did not specify the date by which Zaire was to vacate, the district court issued a supplemental order on January 15, 1992, identical to its earlier November 14, 1991 judgment, but now adding a direction for the U.S. Marshal to remove the Mission and its belongings from the premises physically if Zaire did not leave by January 31, 1992.

The Zairian Mission subsequently sought a stay of this order, and in a March 24, 1992 opinion the trial court granted a limited stay until April 20, 1992—in order to avoid a "hasty eviction" and to permit the Mission to protect the confidentiality of its papers—but refused a more extended stay pending appeal on the grounds that none of the treaties invoked by the Mission or the Foreign Sovereign Immunities Act of 1976 (Act), 28 U.S.C. §§ 1602-1611 (1988), provided support for appellant's position or demonstrated the likelihood of its success on the merits.

The parties have stipulated that enforcement of the district court's eviction order is stayed pending resolution of this appeal. Due to the United States State Department's intervention—including numerous meetings between U.S. officials, the United Nations Legal Counsel, and Zaire's Charge d'Affaires Lukabu Khabouji N'Zaji, and a March 13, 1992 ultimatum to the Mission that two Zairian officials and their families would be expelled from the United States if Zaire did not pay the damages due—Zaire paid its rental arrears in full by three checks sent to Sage Realty on April 9, 23, and 27, 1992. Since that time, Zaire has again lagged in its payments because of the continuing financial crisis in that country. Sage Realty insists that it wants the Mission evicted from its building, even though it appears the parties are continuing to negotiate a new lease.

Zaire appeals from the district court's final judgment of January 15, 1992 granting the landlord summary judgment that awarded damages and directed its physical removal from its leased premises by U.S. Marshals. The United States has filed an *amicus* brief and appeared in support of the Mission.

DISCUSSION

I Inapplicability of Foreign Sovereign Immunities Act

The inviolability of a United Nations mission under international and U.S. law precludes the forcible eviction of the Mission. Applicable treaties, binding upon federal courts to the same extent as domestic statutes, *see Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260-61 (1984); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988), establish that Zaire's Permanent Mission is inviolable. The district court erred in misinterpreting the applicable treaties and in carving out a judicial exception to the broad principle of mission inviolability incorporated in those agreements.

Although the United States' support for appellant is based solely on a number of relevant treaties, the district court rested its decision in part on an interpretation of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988). That Act deserves brief discussion since the landlord continues to raise its provisions. While Sage Realty correctly asserts that Congress aimed to permit courts to make sovereign immunity determinations, *see id.* § 1602, plaintiffs give short shrift to the Act's explicit provision that it operates "[s]ubject to existing international agreements to which the United States is a party." *Id.* § 1609. Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act. *See Mashayekhi v. Iran*, 515 F. Supp. 41, 42 (D.D.C. 1981) ("Under the FSIA . . . , what were then 'existing international agreements' remain[ ] valid and superior to the FSIA wherever terms concerning immunity contained in the previous agreement conflict with the FSIA."); *see also*

14 Wright, *Federal Practice and Procedure* § 3662, at 393 (2d ed. 1985) (the FSIA was "not[ ] intended to alter either diplomatic or consular immunity"). Since international agreements entered into by the United States control the protections that must be accorded to and the obligations owed to the Mission by the United States, the Act does not govern our decision.

II International Agreements

A. *Generally*

The international agreements presented us and relied upon by the United States all pre-date the Foreign Sovereign Immunities Act. They include the United Nations Charter, 59 Stat. 1031 (1945), the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26-Nov. 21 1947, 61 Stat. 416 [hereafter the U.N. Headquarters Agreement], the Convention on the Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 21 U.S.T. 1418 [hereafter the U.N. Convention on Privileges and Immunities], and the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227 [hereafter the Vienna Convention].

The first three of those treaties provide for various diplomatic protections and immunities without specific reference to mission premises. The U.N. Charter, for example, provides "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, *supra*, Art. 105(2). The U.N. Headquarters Agreement states that

representatives of member states "shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities . . . as it accords to diplomatic envoys accredited to it." U.N. Headquarters Agreement, *supra*, Art. V(4). The Convention on Privileges and Immunities of the United Nations recites in somewhat more detail that representatives of member states shall "enjoy the following privileges and immunities: (a) immunity from personal arrest or detention . . .; (b) inviolability for all papers and documents; . . . (g) such other privileges, immunities and facilities not inconsistent [with] the foregoing as diplomatic envoys enjoy. . . ." U.N. Convention on Privileges and Immunities, *supra*, Art. IV, § 11.

B. *Vienna Convention*

While these Treaty provisions standing alone shed little light on the immunities granted a permanent mission, the 1961 Vienna Convention speaks directly to the issue of mission premises. Article 22 of that Convention declares:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission

Article 22, section 2 of the Vienna Convention goes on to note a host state's "special duty" to protect "the premises of the mission" from "any intrusion or damage" and "prevent any disturbance of the peace of the mission or impairment of its dignity"; Article 22, section 3 further states that the premises of a mission shall be immune from "search, requisition, attachment or execution." Mission premises covered by the Convention include both owned and leased property. *See Report of the Interna-*

tional Law Commission, Diplomatic Intercourse and Immunities, U.N. GAOR, 13th Sess., Supp. 9, U.N. Doc. A/3859 (1958), *reprinted in* [1958] II Y.B. Int'l L. Comm'n 89, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1

The other treaties referred to above are consistent with the Vienna Convention's broad interpretation of inviolability, and support the notion that the United States and the United Nations recognize extensive immunity and independence for diplomats, consulates and missions abroad. But because the Vienna Convention remains the most applicable of the treaties cited, our discussion centers on it.

With that connection as a starting predicate, we observe that the district court's judgment—and Sage's arguments supporting it—fail to take into full account the plain language of Article 22. That language contains the advisedly categorical, strong word "inviolable" and makes no provision for exceptions other than those set forth in Article 31, which are irrelevant to our discussion because they relate to personal activities not carried out on behalf of the sending state. Instead of interpreting the deliberately spare text of the Vienna Convention, the district court read into it an exception of its own making. It first observed that "the notion of protection from eviction from privately owned leased premises was not specifically addressed by any of the treaties." This statement is correct so far as it goes. But we part company with the district court when—using that statement as a foundation—it improperly concluded that this case must therefore fall under an unspecified exception to the rule safeguarding a mission's inviolability.

As the United States correctly points out, the drafters of the Vienna Convention considered and rejected excep-

tions, opting instead for broad mission inviolability. For instance, one proposal in an early Convention draft offered an exception to the prohibition on any non-consensual entry by the receiving state. The exception posed was one to be strictly limited to emergencies presenting "grave and imminent risks" to life, property or national security. *See Diplomatic Intercourse and Immunities*, Projet de codification du droit relatif aux relations et immunites diplomatiques, U.N. Doc. A/CN.4/91, *reprinted in* [1955] II Y.B. Int'l L. Comm'n 9, 11, U.N. Doc. A/CN.4/SER.A./1955/Add.1. This proposed exception that would have altered the rule of mission inviolability then existing under customary international law, *id.* at 16, was not adopted. The 1957 draft of the article covering the subject of mission inviolability rejected the proposed exception, and this exception never resurfaced in later drafts. *See Report of the International Law Commission*, Diplomatic Intercourse and Immunities, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3223 (1957), *reprinted in* [1957] II Y.B. Int'l L. Comm'n 131, 136, U.N. Doc. A/CN.4/SER.A/1957/Add.1 [hereafter *1957 Report of Int'l Law Comm'n*]. The commentary to the draft article that was ultimately adopted explicitly emphasized the lack of exceptions to inviolability, stating "the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever." *Id.* at 137. Nothing could be stated more plainly

C. *History Leading to Vienna Convention*

History supports the concept of inviolability expressed in Article 22. Among the laws of nations is the notion that ambassadors must be received and that they must suffer no harm. *Diplomatic Intercourse and Immunities*, Mem-

orandum prepared by the Secretariat, U.N. Doc. A/CN.4/98, *reprinted in* [1956] II Y.B. Int'l L. Comm'n 129, 132, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereafter *Secretariat Memorandum*]. Beginning 1000 years ago when merchants went to foreign lands seeking trade, they sought to have their disputes settled by judges of their choice administering their own national laws. In 1060, for example, Venice was granted the right to send magistrates to Constantinople to try Venetians charged in civil and criminal cases. *1957 Report of Int'l Law Comm'n*, *supra*, at 73. A similar process occurred in the western part of the Mediterranean basin where special magistrates called "consul judges" were appointed to settle disputes between foreign traders and local merchants. *Id.* at 74. Because of the growth of international trade the use of consuls spread. By 1251 Genoa had a consul in Seville and in 1402 there were consuls of the Italian republics in London and the Netherlands. Before the end of the fifteenth century England had consuls in Italy and Scandinavia. *Id.*

In the 16th and 17th centuries individual states took over from traders the task of sending consuls, and the function of the consul was dramatically altered. Judicial duties were eliminated and replaced by the diplomatic functions of looking after the state's interests in trade, industry and shipping. As official state representatives, consuls enjoyed corresponding privileges and immunities. By the 18th century all the major trading states had exchanged consuls. The United States set up its first consulate in France in 1780. *Id.* at 75.

Because of the extraordinary growth of consulates during the 19th century, attempts to codify the rules of international law on that subject began in the 20th century. *Id.* at 77-78. A forerunner of these attempts was the Congress

of Vienna in 1815. Rosalyn Higgins, Editorial Comment, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 Am. J. Int'l L. 641, n.3 (1985) [hereafter Higgins, *Abuse of Diplomatic Privileges*]. In 1927 the Inter-American Commission of Jurists prepared a draft of 26 articles on consuls, which served as the basis for the Convention regarding Consular Agents signed at Havana, Cuba on February 28, 1928. In 1932 Harvard Law School prepared drafts of conventions for the codification of international law on diplomatic privileges and immunities. The International Law Commission added the subject "consular intercourse and immunities" to those selected for codification at the first session of the United Nations Secretariat in 1949, which the General Assembly approved, and began by the usual appointment of a Special Rapporteur on this question. *See 1957 Report of Int'l Law Comm'n, supra*, at 82. The study continued from 1956 to 1959 and his commentary provided the foundation work leading to the 1961 Vienna Convention at which 81 nations participated. Higgins, *Abuse of Diplomatic Privileges, supra*, at 641 n.3.

The Vienna Convention entered into force April 24, 1964. One hundred and thirteen member states have ratified it, including the United States on December 13, 1972. *See* Office of the Legal Advisor, U.S. Department of State, *Treaties in Force: A List of Treaties and Other Agreements of the United States in Force on January 1, 1991*; *Satow's Guide to Diplomatic Practice* 106-09 (Lord Gore-Booth ed., 5th ed. 1988). History establishes beyond question therefore that the Vienna Convention on Diplomatic Relations was intended to and did provide for the inviolability of mission premises, archives documents, and official correspondence. *See Parry & Grant, Ency-*

clopedic Dictionary of International Law 193 (Clive Parry *et al.* eds., 1988).

III Inviolability Recognized Without Exception

A. *Under International Law*

The fact that the Vienna Convention codified long-standing principles of customary international law with respect to diplomatic relations further supports the view that the Convention recognized no exceptions to mission inviolability. *See* Higgins, *Abuse of Diplomatic Privileges*, *supra*, at 642 (The Vienna Convention "is agreed to be largely confirmatory of existing customary law."); *Secretariat Memorandum*, *supra*, at 134. The Convention codified a wide range of diplomatic protections accorded foreign missions over the centuries, *see* Higgins, *Abuse of Diplomatic Privileges*, *supra*, at 641-42, and recognized the independence and sovereignty of mission premises that existed under customary international law.

Under such law the inviolability of mission premises had become by the 18th century an established international practice, *see Satow's Guide to Diplomatic Practice*, *supra*, at 106-09, and represented an integral part of the diplomatic privileges accorded envoys abroad. *See* Francis Deak, *Immunity of a Foreign Mission's Premises From Local Jurisdiction*, 23 Am. J. Int'l L. 582, 587 (1929); 1 L. Oppenheim, *International Law* 793-95 (H. Lauterpacht ed., 8th ed. 1955). The United States and other nations had abided by the inviolability of mission premises long before the Vienna Convention entered into force. *See* IV Green H. Hackworth, *Digest of International Law* 562 (1942) (noting that Foreign Service regulations recog-

nized mission inviolability years before the convention was concluded).

Although diplomatic privilege and mission inviolability arose under various now-outdated theories, including Grotius' notion of the "sacredness of Ambassadors" and the conception of the diplomat as personifying the foreign state's sovereign, *see* Lori J. Shapiro, *Foreign Relations Law: Modern Developments in Diplomatic Immunity*, 1989 Ann. Surv. Am. L. 281, 282 [hereafter Shapiro, *Developments*], modern international law has adopted diplomatic immunity under a theory of functional necessity. *See id.* at 283. Under that doctrine, the United States recognizes the privileges of foreign diplomats in the U.S. with the understanding that American diplomats abroad will be afforded the same protections from intrusions by the host state. The most secure way to guarantee this protection, the United States tells us, is through blanket immunities and privileges without exception.

The risk in creating an exception to mission inviolability in this country is of course that American missions abroad would be exposed to incursions that are legal under a foreign state's law. Foreign law might be vastly different from our own, and might provide few, if any, substantive or procedural protections for American diplomatic personnel. Were the United States to adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad. Another related consideration is the frequent existence of a small band of American nationals residing in foreign countries, often business personnel. Recent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety

is a matter of real and continuing concern. Potential exposure of American diplomats to harm while serving abroad and to American nationals living abroad is not "pure conjecture," as plaintiffs blithely assert.

The narrow reading of the Vienna Convention urged by Sage Realty and adopted by the district court is inadequately supported. Citing only selective examples of the protection accorded by the Convention and other international agreements, Sage Realty fails to account for the functional necessity of mission inviolability. In a weak attempt to demonstrate that only extreme behavior is covered by Article 22, plaintiffs refer to a 1986 meeting of the U.N. General Assembly urging the suppression of terrorist action against missions and a 1967 U.N. study noting that the U.S. is under an obligation to protect the U.N. headquarters district from "hostile demonstrations" outside mission premises. Similarly, the district court relied upon selected search and seizure type of protections afforded to missions and their documents to insist that only sudden unexpected intrusions are governed by the Convention. However, as explained below, the circumstance of a sudden intrusion is largely beside the point and results in a restricted view of the Vienna Convention at odds with its purport and practice.

B. *Purpose and Practice Under Article 22*

To begin with, the examples used by the district court do not conflict with the broad language of "inviolability" appearing in the Convention's text, nor do they confute the longstanding international support for mission inviolability. Instead, upon proper analysis, sudden intrusion and protection against search and seizure further support the sanctity of mission premises. Nothing in the commen-

tary to the draft articles suggests that fears about "mob violence" and "unannounced seizures" were ever the main concerns underlying diplomatic immunities, as the district court mistakenly believed. *See, e.g., 1957 Report of Int'l Law Comm'n, supra*, at 137 (emphasizing respect due to a mission, noting that process servers may not even serve papers without entering at the door of a mission because that would "constitute an infringement of the respect due to the mission"). Perhaps most telling, no support may be found for an interpretation of limited inviolability in either the commentary to the Vienna Convention or the scholarly literature concerning the convention and the customary international law principles it codified.

Plaintiffs' position is also refuted by what has occurred in practice. The United States has consistently respected the complete inviolability of missions and consulates. Even in extreme cases U.S. authorities will not enter protected premises without permission following, for example, bomb threats. Nor have local authorities been permitted to enter to conduct health and building safety inspections without the consent of the mission involved. *See, e.g.*, Eleanor C. McDowell, *Digest of United States Practice in International Law 1976* 198-99 (1977). An affidavit from the counselor for Host Country Affairs for the United States Mission to the United Nations attests that after the Soviet mission to the U.N. was bombed in 1979, the FBI and local police officers were all refused entry to the mission until the Soviets consented to allow certain law enforcement officers to enter. Absent such consent, the United States tells us, government officials would not have attempted to enter the Soviet mission's premises.

Additional support for the position we take here is found in decisional law. The Supreme Court has made

clear: "When the parties to a treaty both agree to the meaning of a treaty provision, and that interpretation follows from the clear treaty language[, the court] must, absent extraordinarily strong contradictory evidence, defer to that interpretation." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *accord In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1280 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991). This case presents such a situation. Treaty language uses the term "inviolability" and the Convention contains no exceptions relevant to this case. Because the United States agrees to an accepted interpretation of the Vienna Convention, and because no evidence appears of a contrary interpretation advanced by any of the United Nation members, all of whom are parties to the Convention, *see* G.A. Res. 41/78, U.N. GAOR, 41st Sess., Supp. No. 53, at 260, U.N. Doc. A/41.53 (1986) (General Assembly resolution emphasizing inviolability of missions as prerequisite to carrying on diplomatic functions and stressing States' duties to protect mission premises as required by international law), federal courts must defer to the language of Article 22. *Cf. Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 474 (2d Cir. 1980) (recognizing U.S. obligations under Article 22 of the Vienna Convention), *cert. denied*, 450 U.S. 913 (1981).

Hence, that portion of the district court's order awarding Sage Realty immediate possession of the premises and directing U.S. Marshals to remove the mission, its effects, and its personnel physically from the premises must be reversed.

IV Contrary Holding Foreclosed

We recognize that there are negative policy implications from the ruling we propose. The undisputed economic burden of inviolability, for example, falls most heavily upon the private landlord, not on the government that urges inviolability of mission premises. Yet, an interest in fairness to the landlord does not justify creating a judicial gloss on the concept of mission inviolability

Particularly in recent years, attention has focused on an array of abuses of diplomatic privilege, *see*, *e.g.*, Higgins, *Abuse of Diplomatic Privileges*, *supra*, at 642-43 (noting diplomats and their families committing wide range of petty and more serious offenses in England), and a number of reforms to various diplomatic immunities have been suggested. *See* Shapiro, *Developments*, *supra*, at 281, 294-306. Nevertheless, reform of mission inviolability has not been undertaken, and the doctrine continues without exception to be the rule. *Cf.* Higgins, *Abuse of Diplomatic Privileges*, *supra*, at 646 ("[N]otwithstanding popular and ill-informed views to the contrary, the inviolability of premises is not lost by the perpetration from them of unlawful acts."). Reforming the Vienna Convention may well be a valid objective. But federal courts are an inappropriate forum to accomplish the amendment of a multilateral treaty to which the United States is a party. *See* Shapiro, *Developments*, *supra*, at 295 (judicial reform "would threaten a loss of consistency in the application of the Vienna Convention from country to country and could have dangerous international repercussions in the form of reciprocal action by other states").

Congress is of course the branch of government best suited to address the full array of concerns involved in altering the Vienna Convention. Already, the legislature

has enacted the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-e (1988), to counter some of the more flagrant abuses of diplomatic privilege observed in this country. That Act gives the President the power "on the basis of reciprocity" to establish privileges and immunities for missions and their members "which result in more favorable or less favorable treatment than is provided under the Vienna Convention." *Id.* § 254c. Although the act requires liability insurance coverage for diplomatic missions and their representatives and families to insure against negligence arising from the operation of motor vehicles, vessels or aircraft, *id.* § 254e, it contains no restrictions on mission inviolability. While Congress and the President—via the Diplomatic Relations Act—possess the power to limit mission inviolability, neither has chosen to exercise that power. Our sister branches of government may more appropriately initiate whatever revision, if any, of the Vienna Convention is deemed necessary. *Cf. Palestine Liberation Org.*, 695 F. Supp. at 1465 ("Congress *has the power* to enact statutes abrogating prior treaties or international obligations entered into by the United States").

This is not to say that Sage Realty is left wholly without a remedy for the mission's egregious, albeit explicable, shortcoming in rent payments. The Zairian Mission has not raised any challenge to the district court's authority to award monetary damages in favor of the landlord. Such judgment—even absent forcible eviction—is not without weight: to date, diplomatic efforts and pressure have proven extraordinarily successful at getting Zaire to pay the judgment for its back rent. The State Department has diligently pursued the matter on behalf of plaintiffs and went so far as to demand the expulsion of several

Zairian diplomats if the judgment was not paid by a certain deadline.

A landlord in Sage Realty's position that desires to rent to a foreign mission may also be able to protect itself by requesting a waiver of inviolability in advance or by demanding additional security. The market rate for rent to such tenants might itself rise to incorporate risks posed by mission inviolability. In any event, the district court's worry that landlords in New York's rental market might shut out foreign missions because of their untouchable status appears overblown, especially since Sage Realty apparently continues negotiating for a new lease with the Zairian mission. If a sophisticated landlord like Sage Realty bears some risk in renting to a U.N. mission, it is not without notice of the diplomatic immunities with which it may later become entangled.

CONCLUSION

Accordingly, the portion of the district court's order granting the landlord possession of the premises and ordering the U.S. Marshals forcibly to seize the premises, if necessary, is reversed. That portion of the district court's order awarding plaintiffs monetary damages is affirmed.

Affirmed, in part, reversed, in part.

767 THIRD AVENUE ASSOCIATES and
Sage Realty Corporation, Plaintiffs,

v.

PERMANENT MISSION OF The REPUBLIC OF ZAIRE TO The UNITED NATIONS, Defendant.

No. 91 Civ. 4968 (LBS).

United States District Court, S.D. New York.

March 24, 1992.

Foreign mission moved for stay of previous District Court judgment ordering United States Marshal to evict foreign mission from leased premises for nonpayment of rent. The District Court, Sand, J., held that: (1) Foreign Sovereign Immunities Act did not confer immunity on foreign mission from eviction for nonpayment of rent from privately owned premises; (2) United States treaty obligations did not confer immunity on foreign mission from eviction for nonpayment of rent from privately owned premises; and (3) foreign mission failed to establish irreparable injury, public interest, and likelihood of success on merits so as to justify extension of stay of judgment.

Motion denied.

Shea & Gould (Robert J. Ward, Joseph Ferraro, Jean-Marie L. Atamian, Andrew B. Messite, of counsel), New York City, for plaintiffs.

Rubin & Shang (Jeffrey M. Rubin, David C.Y. Cheung, of counsel), New York City, for defendant.

U.S. Atty., S.D.N.Y., M. Chinta Gaston, Asst. U.S. Atty., New York City, for U.S.

SAND, District Judge.

This action calls into question the rights of a private landlord who has leased premises to a foreign mission to the United

Nations which has concededly defaulted on its rental obligation for over a year and a half. The premises at issue are the entire twenty-fifth floor of a commercial office building. The action presents the important question, apparently of first impression, whether such a landlord may regain possession of the premises from its tenant or whether such action is forever barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1991) (the "FSIA"), or any treaty obligations.

By order of judgment dated January 15, 1992, we awarded plaintiffs damages and possession of their premises and directed the United States Marshal to remove the Permanent Mission in the event that it failed to vacate on or before January 31, 1992. By order dated January 31, 1992, upon defendant's request, we granted a stay of the order of eviction and ordered the parties to appear before us on February 3, 1992. After a lengthy hearing on that date, we directed the parties and the United States Government, which had since intervened on defendant's behalf, to brief more fully the issue of defendant's claim of diplomatic immunity from eviction. The parties have since done so, and we now consider the merits of defendant's and the Government's (hereinafter "Movants") application for a continued stay pending appeal.

I. BACKGROUND

The backdrop to this action is a landlord-tenant dispute between plaintiffs 767 Third Avenue Associates and Sage Realty Corporation (together "Plaintiffs") and defendant Permanent Mission of the Republic of Zaire to the United Nations (the "Mission"). Plaintiffs are, respectively, a partnership which owns the building at 767 Third Avenue in New York City and its managing agent. The Mission is the official delegation representing the Republic of Zaire at the United Nations.

On May 19, 1982, plaintiff Sage Realty entered into a ten year written lease with the Mission for the entire twenty-fifth floor of the building (the "Premises"). The Mission took possession of the Premises on or about May 22, 1982 and remains in possession to this date.

In October 1987, after the Mission had failed to pay its rent for more than seven months, Plaintiffs commenced an action against the Mission before this Court. By judgment dated August 22, 1989, we terminated the Mission's lease, awarded possession of the Premises to Plaintiffs, and awarded Plaintiffs damages in the amount of $244,157.49.

After entry of the above judgment, the Mission paid Plaintiffs the full amount of damages. With Plaintiffs' consent, the Mission remained in possession as a month-to-month tenant, without a written lease, paying use and occupancy charges in the fixed amount of $19,350 per month.

During the summer of 1990, the Mission again began to default on its rental obligations. By letter dated April 26, 1991, prompted by the Mission's failure to respond to repeated demands to cure its arrears, plaintiff Sage Realty notified the Mission that Plaintiffs had elected to terminate the month-to-month tenancy as of May 31, 1991. On July 22, 1991, Plaintiffs commenced this action against the Mission, seeking unpaid use and occupancy charges from August 1990, attorneys' fees, and possession of the Premises.

Plaintiffs thereafter moved for summary judgment and the Mission cross-moved to dismiss. The Mission did not contest its default on the rental payments, but rather claimed that it had been improperly served under the FSIA and that Plaintiffs were precluded from seeking the remedy of eviction by the doctrine of sovereign immunity. The Court heard oral argument on both motions on November 7, 1991.

Following argument on that date, we issued an oral opinion granting Plaintiffs' motion for summary judgment and denying the Mission's cross-motion to dismiss. *See* Transcript of Oral Argument, November 7, 1991. In reaching our decision, we first found that "actual notice" of the suit had been given, thereby achieving the purposes of the FSIA with respect to service. *Id.* at 9-10. We also rejected the Mission's claim that it was immune from eviction, finding that the FSIA's prohibition against

"execution and attachment" of property owned by a foreign sovereign did not preclude the eviction of a tenant wrongfully in possession of privately owned premises. *Id.* at 10-11.

On November 14, 1991, this Court signed an order and judgment awarding Plaintiffs damages and directing the Mission to vacate the Premises. Because that order did not specify a date by which the Mission was required to depart, however, Plaintiffs submitted a second order and judgment. On January 15, 1992, we signed the second order and judgment (hereinafter the "Judgment"), which: awarded Plaintiffs back-damages of $387,154.72. and $833.19 per day for continued use and occupancy; directed the Mission to vacate the Premises; and directed the United States Marshal to remove the Mission in the event that it failed to vacate on or before January 31, 1992.

On January 28, 1992, the Mission filed a Notice of Appeal to the Second Circuit. On January 30, 1992, the Mission sought a stay of the Judgment pending appeal and informed the Court that the United States Government planned to intervene on its behalf. By order dated January 31, 1992, we granted a stay of that part of the Judgment directing the Marshal to evict the Mission and ordered the parties to appear for a conference on February 3, 1992.

On February 3, 1992, following submission of the Government's Statement of Interest,[1] Plaintiffs, the Mission and the Government appeared before the Court. After extended argument during which the Government represented that eviction of the Mission would contravene United States treaty obligations and that diplomatic alternatives were being actively pursued,[2] we extended the stay and ordered further briefing on the

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[1] The Government intervened in this suit pursuant to 28 U.S.C. § 517 (1991), which authorizes the Attorney General to send any officer of the Department of Justice to attend to the interests of the United States in a pending suit.

[2] For a detailed chronology of the State Department's diplomatic efforts to induce the Mission to pay this debt, *see* Declaration of John W. Wolf, Acting

(Footnote continued)

issue of immunity from eviction. *See* Transcript of Oral Argument, February 3, 1992 (hereinafter "Trans."). The Government and Plaintiffs have since submitted further briefs and affidavits, and we now turn to the merits of the motion for a stay.

II. DISCUSSION

In deciding whether to grant a stay pending appeal, this Court must consider four factors: (1) whether Movants have made a strong showing of the likelihood of success on the merits; (2) whether Movants will be irreparably injured absent the stay; (3) whether granting the stay would substantially harm the other parties in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2118, 95 L.Ed.2d 724 (1987); *United States v. Eastern Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir.1991).

A. LIKELIHOOD OF SUCCESS ON THE MERITS.

Of the four factors relevant to our decision to grant or deny a stay, the question of likelihood of success on the merits is the most hotly contested by the parties. Movants do not dispute the Mission's default on its rental obligations, but insist that the FSIA and other treaties relating to sovereign immunity preclude the remedy of eviction. Plaintiffs respond that those pronouncements do not apply to the situation at hand, and emphasize that if Movants' contentions were accepted, a private landlord could be forced to "host" its non-paying diplomatic tenant *ad infinitum*, so that its property would in effect have been "taken."

Assistant Secretary of State of International Organization Affairs, in Support of Government's Supplemental Statement of Interest (February 27, 1992) ¶ 10 (hereinafter "Wolf Dec."). Recently, the State Department has stepped up those diplomatic pressures. According to the Supplemental Declaration of Robert C. Moller, submitted to this Court on March 16, 1992, the State Department has warned Zaire that unless the debt to Plaintiffs is paid by April 18, 1992, two identified diplomats from the Zaire Mission will be expelled from the United States for "abuse of the privilege of residence" pursuant to § 13(b) of the Headquarters Agreement between the United States and the United Nations. *See* Supplemental Declaration of Robert C. Moller, Counsel for Host Country Affairs for the United States Mission to the United Nations (March 16, 1992).

1. *Immunity Under the FSIA.*

[1] The first basis for Movants' claim of immunity from eviction is section 1609 of the FSIA, which states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, *the property in the United States of a foreign state shall be immune from attachment, arrest and execution.*

28 U.S.C. § 1609 (1991) (emphasis added). Sections 1610 and 1611 of the Act set forth certain exceptions to the general ban against execution or attachment, none of which are asserted by Plaintiff here.[3] Movants cite this section for the proposition that although Plaintiffs may rightfully seek and obtain a monetary judgment against them, they may not regain possession of the Premises.

We have reviewed the language of the FSIA and the legislative history underlying it. Neither suggests immediately that Congress considered the precise situation at issue: whether an eviction constitutes an "attachment" or "execution" falling within the statutory prohibition. We have also reviewed a number of cases construing the statute in other factual contexts, including *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir.1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985).

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[3] Because the Mission's lease contained certain boilerplate provisions regarding eviction, *see* Lease dated May 19, 1982, § 17.01(2)(2d) (attached as Exh. A to Plaintiffs' Notice of Motion for Summary Judgment), the parties have alluded to the potential applicability of § 1610(a)(1) of the Act. That section sets forth a "waiver" exception to the immunity conferred by § 1609, permitting execution or attachment of "property in the United States of a foreign state . . . used for a commercial activity in the United States" where "the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication."

Plaintiffs do not directly claim that the waiver exception applies, and argue instead that the Mission's lease has terminated and that "no property owned by defendant" is involved at this point. *See* Memorandum of Law in Opposition to Defendant's Motion for a Stay Pending Appeal at 15. While we need not determine whether the section applies, therefore, we note that the exception apparently extends only to property "used for a commercial activity," and that Plaintiffs have made no showing that the Premises are used for anything other than diplomatic purposes.

In the *Letelier* case, the plaintiffs had obtained a tort judgment against the Republic of Chile and sought to satisfy it by executing against the property of the Chilean national airline, which was located in New York. The Second Circuit first addressed the question of whether the plaintiffs had demonstrated that the airline was a suitable alter ego of Chile for the purposes of satisfying the judgment, and found that they had not. Even assuming that the plaintiffs might later be able to meet that burden, however, the Court held that the FSIA did not permit execution against a foreign state's property under the circumstances of the case. Instead, the Court found that execution was permissible only if the property fell within one of the explicit exceptions to § 1609, and that that result was dictated by the FSIA even if it left a plaintiff completely without a remedy to enforce its judgment against a foreign state. *Id.* at 798-99.

After a careful review of the above-cited authorities, we find that the sovereign immunity conferred by the FSIA does not include immunity from eviction for nonpayment of rent from privately owned premises. The statute by its very terms contemplates a situation in which a judgment creditor seeks to enforce its judgment against a sovereign by attaching or otherwise executing upon assets owned by the foreign state. Yet while that prohibition is crystal clear and efforts to evade it have understandably been rebuffed by other courts, *see, e.g., Letelier, supra*, the circumstances of this case are sharply distinguishable. Here, instead of seeking to enforce the Judgment of this Court by attaching or executing upon the Mission's assets, Plaintiffs are merely attempting to regain possession of property which is rightfully theirs.[4] That remedy is neither explicitly nor

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[4] Although in certain instances a foreign sovereign's leasehold interest may constitute "property," in this situation, no such property interest is at stake. As Plaintiffs note in their brief opposing the stay: "At best, [the Mission] had a ten year leasehold interest in the Premises: that interest, and defendant's interest as a month-to-month tenant, have clearly and lawfully terminated. Now [the Mission] has bare and wrongful possession of the Premises and nothing else." *See* Memorandum of Law in Opposition to Defendant's Motion for a Stay Pending Appeal at 10.

implicitly prohibited by the FSIA, and we decline Movants' invitation to expand the immunity conferred by that Act.

2. *Immunity Under United States Treaty Obligations.*

[2] Movants next claim that the Mission cannot be evicted in light of various treaties and charters to which the United States is a signatory. Movants rely heavily on Article 22 of the Vienna Convention on Diplomatic Relations, which provides:

> (1) The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> (2) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any instrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

See Vienna Convention on Diplomatic Relations, April 18, 1961, art. 22(1) & 22(2), 23 U.S.T. 3227 (hereinafter the "Vienna Convention"). Although it is not cited in any of Movants' briefs, article 22(3) provides further that "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." *Id.* art. 22(3).

In addition to those sections of the Vienna Convention, Movants find support for their position in the United Nations Charter and the 1946 Convention of the Privileges and Immunities of the United Nations (hereinafter the "U.N. Convention"). Those agreements confer upon representatives to the United Nations "such privileges and immunities, as are necessary for the independent exercise of their functions in connection with the Organization," U.N. Charter, August 8, 1945, art. 105(2), 59 Stat. 1031, 1053, and "inviolability for all papers and

documents," U.N. Convention, February 13, 1946, art. IV, § 11(b), 21 U.S.T. 1418. Finally, Movants cite a number of cases that refer to the United States' legal obligation under these treaties to protect the premises of foreign missions *See, e.g., Boos v. Barry*, 485 U.S. 312, 323, 108 S.Ct. 1157, 1165, 99 L.Ed.2d 333 (1988) (affirming the Nation's "need to protect diplomats"); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 474 (2d Cir.1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1352, 67 L.Ed.2d 337 (1981) (citing the United States' "substantial interest in protecting foreign officials and their property" to uphold restrictions on demonstrations outside the Soviet Permanent Mission).

We have scrutinized the language of these treaties, the background to their adoption, and the cases cited in Movants' briefs. Our review convinces us that the notion of protection from eviction from privately owned leased premises was not specifically addressed by any of the treaties. We conclude, however, that the treaties' grants of "inviolability" and "privileges and immunities" were prompted by concerns other than those present in this case.

The language of the above treaties demonstrates that they were driven by two principal concerns: first, a perceived need to protect the sovereign from mob violence and other harassment; and second, a recognition that the premises of the sovereign are entitled to protection from unannounced seizures or other invasions of privacy. The first of these concerns is reflected in the Vienna Convention's articulation of a "special duty" to protect the premises of the mission from any "intrusion," "damage," "disturbance of the peace," or "impairment of its dignity," and in a number of cases rejecting first amendment challenges in light of the government's obligation to protect foreign diplomats and their property. *See, e.g., Concerned Jewish Youth, supra; International Soc'y for Krishna Consciousness, Inc. v. City of New York*, 501 F.Supp. 684 (S.D.N.Y.1980); *Greenberg v. Murphy*, 329 F.Supp. 37 (S.D.N.Y.1971). The second concern is reflected in the Vienna Convention's declaration of the "inviolability" of mission premises and immunity from search and seizure; in the

U.N. Convention's assertion of "inviolability for all papers and documents"; and implicitly in the U.N. Charter's grant of privileges and immunities "necessary" for the independent exercise of United Nations functions.

This Court has had the benefit of extensive briefing by the parties and has heard oral argument on two occasions. Despite that substantial record, we remain unconvinced that permitting the eviction of the Mission would implicate either of the interests identified above. In the first place, we reject outright Movants' contention that the eviction would threaten the physical safety of Mission members. *See* Government's Supplemental Statement of Interest at 18 (noting that "should Zairian representatives . . . resist peaceful attempts by the United States Marshal to enter the mission, physical compulsion would be required"). Not only is it highly speculative that such resistance would occur, but it is doubtful that the treaties were intended to protect diplomats from injuries sustained resisting a party's lawful efforts to recover its own property.

Nor is the second concern applicable in this context, since although eviction would require entry of the Premises by a United States Marshal, such an entry would hardly be sudden or unexpected. Plaintiffs put the Mission on notice of their intent to evict them by letter dated April 26, 1991. Since that time, Plaintiffs not only commenced a court action but obtained a Judgment of eviction from this Court. Even the Government has informed the Mission over the course of pursuing "diplomatic alternatives" to eviction that the Mission could not expect to remain in the Premises indefinitely without paying rent. *See, e.g.*, Letter from Thomas R. Pickering, United States Representative to the United Nations, to Lukabu Khabouji N'Zaji, Zaire's Charge d'Affaires (February 11, 1992) (attached as Exh. A to Wolf Declaration) (warning that "Unlimited tenure in offices or residences without paying rent is unacceptable."). The Mission has not only had ample time to avoid a non-consensual entry by vacating voluntarily, therefore, but any entry at this point will

have been preceded by so much notice that the privacy of Mission members or secrecy of Mission papers could not possibly be threatened.[5]

In sum, Movants have failed to demonstrate that either the FSIA or other treaties preclude Plaintiffs from evicting them from the Premises. Because they have proffered no other defense to the Court's Judgment of eviction, Movants have not met their burden of demonstrating a likelihood of success on the merits.

B. IRREPARABLE INJURY.

[3] Another factor that we must consider is whether Movants will suffer irreparable injury unless a stay is granted. Movants first argue that the Mission will suffer irreparable harm if evicted because it will "no longer be able to carry out its functions" or "meet its agenda at the United Nations." *See* Defendant's Letter Application for a Stay Pending Appeal (January 29, 1992) at 2. Movants also argue that our refusal to stay the eviction will inflict irreparable injury on the Government, both by "forcing" it to violate its international treaty obligations and by threatening the status of United States diplomatic personnel abroad.

Movants' first claim of irreparable harm is unconvincing. The Mission contends that eviction would interfere with its ability to function as a productive member of the United Nations. It has made no showing that the Premises at 767 Third Avenue

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[5] In an effort to bolster its contention that a mission cannot be entered for any purpose without consent, the Government describes how even in urgent situations such as a bomb scare, United States agents customarily refuse to enter a mission until they receive permission from its occupants. *See* Declaration of Robert C. Moller, Counsel for Host Country Affairs for the United States Mission to the United Nations, in Support of the Government's Supplemental Statement of Interest (Feb. 27, 1992), ¶¶ 3-6 (hereinafter "Moller Dec."). Those situations are distinguishable from the instant case, however, in that the sudden and unannounced entry by United States agents occasioned by a bomb scare could clearly compromise the confidentiality of mission affairs. In this case, by contrast, the Mission will have had more than ample time to ensure that its removal from the Premises is an orderly one.

are unique, however, or that it is restrained by anything other than its own financial condition from moving elsewhere. The Mission's failure to seek alternative housing arrangements during the pendency of this action undercuts the legitimacy of this claim of irreparable harm.

Movants' other claims of irreparable injury are more considerable. The Government alleges that our condonation of the eviction will force it to violate its international obligations, and expresses concern that our decision will compromise the protection afforded the United States mission in Zaire and other missions and personnel abroad. *See* Wolf Dec. ¶¶ 7-9.

Although the above discussion reflects our own view that the eviction does not contravene United States treaty obligations, we have no way of gauging whether the Government's predictions of international repercussions are realistic or overblown. Despite our willingness to acknowledge a national interest in blocking the eviction, however, we find unacceptable Movants' contention that the entire burden of these concerns should be borne by a single private landlord. The Government's obligation and ability to distribute that burden more broadly is discussed in greater detail in Part D, *infra*.

Having found Movants' allegations of irreparable harm inadequate to support an extension of the stay, we turn now to the remaining two factors of the four-part test.

C. SUBSTANTIAL HARM TO PLAINTIFFS.

[4] The third factor to consider in determining whether to grant Movants' application is whether the stay would "substantially harm" Plaintiffs. We find that this factor weights heavily in Plaintiffs' favor.

Movants have argued throughout the litigation that a stay will not harm Plaintiffs because they have "already obtained the protection of a monetary judgment running in their favor for every day a stay is in place." *See* Government's Statement of Interest at 11. Movants refer to this Court's Judgment of January 15, 1992,

which awarded damages for use and occupancy in the amount of $833.19 "for every day from November 1, 1991 until defendant vacates the premises."

Whatever the superficial logic of Movants' contention, it ultimately misses the point: this Court's Judgment is worthless unless Plaintiffs are guaranteed some means of recovering their rapidly escalating damages. Movants have represented that Zaire is in dire financial straits at the present time, *see* Wolf Dec. ¶ 4, and the Government specifically declined to insure collectibility in response to the Court's questions at oral argument. *See* Trans. at 5. In light of the uncertainty of recovering any damages under the Judgment, Plaintiffs' interest in "cutting their losses" by evicting the Mission and reletting the Premises is entirely understandable. Plaintiffs have therefore made a strong showing that they will suffer "substantial" harm in the event that a stay is granted.

D. THE PUBLIC INTEREST

[5] The final factor that we must consider is whether a stay pending appeal would serve the public interest. Movants raise essentially the same arguments with respect to this factor as they did with respect to their claim of irreparable injury – that the public interest is ill-served by forcing the Government to violate its obligations under international law and that we should exercise extreme care to prevent a landlord-tenant dispute from escalating into an "international incident." *See* Government's Statement of Interest at 11.

In response to Movants' contentions, we return to an issue raised earlier in addressing their allegations of irreparable injury: that no matter how important the Executive Branch's asserted foreign policy objectives may be, Plaintiffs should not be forced to assume sole responsibility for them. If the interests are as significant as the Government insists, they can surely be promoted more equitably – possibly by designating United States or United Nations funds to insure collectibility of the Judgment – than by thrusting their entire burden on the shoulders of a single private landlord. As Plaintiffs have argued

and as we suggested repeatedly at cral argument, any other conclusion would raise a serious issue as to whether Plaintiffs had been subjected to an unconstitutional "taking" under the Fifth Amendment. *See* Memorandum of Law in Opposition to Defendant's Motion for a Stay at 8, 27; Trans. at 9-10, 19-20.

As a final matter, we note that it is far from obvious that the public interest and the interest of sovereigns themselves would be served by a finding that mission premises were immune from eviction. It is of course for the State Department, and not for this Court, to evaluate the chilling effect which would be placed on prospective landlords' willingness to rent to foreign sovereigns if the consequence of such a rental was the effective transfer of title insofar as legal remedies for non-payment of rent were concerned. Nevertheless, because Movants have argued that landlords have means of protecting themselves other than the eviction remedy, *see, e.g.*, Government's Supplemental Statement of Interest at 15 n. 4, we feel compelled to address them.

The Government first seeks to minimize the concern that landlords may be deterred from renting to foreign sovereigns by noting that some landlords attempt to avoid Plaintiffs' plight by obtaining letters of credit guaranteeing payment of the rent. If such letters of credit extend only over the stated term of the lease, however, they would clearly afford insufficient protection against a diplomatic tenant who wrongfully remains in possession after the lease has expired. The cost of a letter of credit which sought meaningfully to protect the landlord would be considerable, and such cost would of course be borne by the tenant.

The Government next suggests that a landlord could protect itself by requiring a waiver of sovereign immunity in the lease itself. That proposal is also subject to significant limitations, however. In the first place, the waiver exception set forth in the FSIA appears to extend only to "property . . . used for a commercial activity in the United States." FSIA § 1610(a); *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 28, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 (stating that the "property in question must be used for a commercial activity in the United States"

for the exceptions in paragraphs (1)-(5) of § 1610(a) of the FSIA to apply). The exception would therefore be of little help to a landlord renting to a mission, which by definition is used for diplomatic rather than commercial purposes.

Even were Plaintiffs able to invoke the waiver exception under the FSIA, however, that would not settle the issue. Since the immunity conferred by the FSIA is explicitly "[s]ubject to existing international agreements to which the United States [was] a party at the time " of the Act's passage, *see* FSIA § 1609, we would still have to consider whether waiver was prohibited by any of the other treaties or charters discussed above. Finally, even assuming that an explicit waiver were permissible under those other agreements, it still might not protect a landlord where, as here, the lease containing the waiver has terminated and it is unclear whether the waiver is still in effect.

In sum, it is far from clear that a stay of the Judgment is in the best interest of the public. Movants have therefore failed to demonstrate that this factor supports their contention that a stay should be granted.

III. CONCLUSION

As our above review of the four factors suggests, Movants have failed to make a showing of likelihood of success on the merits, have made an inadequate showing of irreparable injury and promotion of the public interest, and have not overcome Plaintiffs' showing of substantial harm in the event a stay is granted. In an ordinary case, therefore, we would deny Movants' application for a stay in its entirety.

This is not an ordinary case, however, and as our discussion in Part A of the opinion reflects, our view of the merits has been influenced by the Mission's abundant notice of the eviction and corresponding ability to protect itself against any breach of security that it might engender. To lay to rest any lingering fears that a hasty eviction might threaten the confidentiality of Mission papers or the privacy of its members, however, we will

deny Movants' request for a stay pending appeal but grant a more limited stay until April 20, 1992. That period will have the additional benefit of permitting any party to apply to the Second Circuit for a further stay. We deny any stay beyond April 20, 1992.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAGE REALTY CORPORATION AND
767 THIRD AVENUE ASSOCIATES

Plaintiffs,

-against-

PERMANENT MISSION OF THE REPUBLIC
OF ZAIRE TO THE UNITED NATIONS

Defendant.

U.S. DISTRICT COURT, FILED AUG 22 1989

CIVIL ACTION NO.
87 CIV. 7157

HONORABLE LEONARD SAND

DEFAULT JUDGMENT

#89.2092

Upon the motion for default judgment dated June 12, 1989, the affidavit of Andrew L. Odell sworn to on the 12th day of June, 1989, the affidavit of Melvyn Kaufman sworn to on the 12th day of June, 1989, the Clerk's Certificate dated June 13, 1989, and upon the decision of the court dated August 4, 1989 it is

I.

ORDERED, ADJUDGED, and DECREED that Defendant's lease ("Lease") of the entire 25th floor at 767 Third Avenue, New York, New York 10017 is terminated and all of Defendant's rights thereunder are terminated, and it is further

II.

ORDERED, ADJUDGED, and DECREED that Plaintiffs be awarded possession of the entire 25th floor at 767 Third Avenue, New York, New York 10017 ("Premises") and that Defendant vacate the Premises; and it is further

III.

ORDERED ADJUDGED, and DECREED that Plaintiffs recover against Defendant $181,647.59 for Defendant's use and occupancy of the Premises under the Lease plus allowable interest in the amount of $5,200.28 and $51,245.25 for attorney's fees plus allowable interest in the amount of $6,064.37, for a total amount due of $244,157.49.

Dated: August 22, 1989
New York, New York

ENTER

/s/Leonard B. Sand
U.S.D.J. /s/rag

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 8-24-89

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

767 THIRD AVENUE ASSOCIATES, and SAGE REALTY CORPORATION,	:	
Plaintiffs,	:	91 Civ. 4968
-against-	:	(LBS)
PERMANENT MISSION OF THE REPUBLIC OF ZAIRE TO THE UNITED NATIONS,	:	
Defendant.	:	

ORDER AND JUDGMENT

91,2427

Plaintiffs 767 Third Avenue Associates and Sage Realty Corporation having moved this Court for an Order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting them summary judgment on their cause of action:

Upon the motion for summary judgment dated October 16, 1991, the supporting affidavit of Marcy Kent, sworn to the 10th day of October, 1991, the Cross-Motion of defendant dated November 4, 1991, the Reply Affirmation of David Cheung in support of the cross-motion, the Reply Affidavit and Affidavit in Opposition to the cross-motion of Marcy Kent, sworn to the 7th day of November, 1991 and upon the decision of the Court dated November 7, 1991, it is

I.

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is hereby granted in all respects; and that defendant's cross-motion is denied in its entirety; and it is further

II.

ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded the immediate possession of the entire 25th floor at 767 Third Avenue, New York, New York 10017 ("Premises") and that defendant forthwith vacate the Premises; and it is further

ORDERED, that, in the event defendant fails to vacate the Premises on or before _____, 1991, the United States Marshall is hereby directed to physically remove defendant and all of its property therefrom; and it is further

III.

ORDERED, ADJUDGED AND DECREED that plaintiffs recover against defendant $387,154.72 for defendant's use and occupancy of the premises through October 31, 1991 and the Clerk of this Court is directed to enter judgment in favor of plaintiffs accordingly and that plaintiffs recover use and occupancy in the per diem amount of $832.19 for every day from November 1, 1991 until defendant vacates the premises.

Dated: November 14 1991
New York, New York

/s/Leonard B. Sand
U.S.D.J.

THIS DOCUMENT WAS ENTERED
ON THE DOCKET NOVEMBER 29, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

767 THIRD AVENUE ASSOCIATES, and SAGE REALTY CORPORATION,	: :U.S. :DISTRICT
Plaintiffs,	:COURT :FILED JAN
-against-	:16 1992 S.D. :OF N.Y.
PERMANENT MISSION OF THE REPUBLIC OF ZAIRE TO THE UNITED NATIONS,	: :91 Civ. 4968 :(LBS)
Defendant.	:

ORDER AND JUDGMENT

92,0064

Plaintiffs 767 Third Avenue Associates and Sage Realty Corporation having moved this Court for an Order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting them summary judgment on their cause of action:

Upon the motion for summary judgment dated October 16, 1991, the supporting affidavit of Marcy Kent, sworn to the 10th day of October, 1991, the Cross-Motion of defendant dated November 4, 1991, the Reply Affirmation of David Cheung in support of the cross-motion, the Reply Affidavit and Affidavit in Opposition to the cross-motion of Marcy Kent, sworn to the 7th day of November, 1991 and upon the decision of the Court dated November 7, 1991, it is

I.

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is hereby granted in all respects; and that defendant's cross-motion is denied in its entirety; and it is further

II.

ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded the immediate possession of the entire 25th floor at 767 Third Avenue, New York, New York 10017 ("Premises") and that defendant forthwith vacate the Premises; and it is further

ORDERED, that, in the event defendant fails to vacate the premises on or before January 31, 1992, the United States Marshall is hereby directed to physically remove defendant and all of its property therefrom; and it is further

III.

ORDERED, ADJUDGED AND DECREED that plaintiffs recover against defendant $387,154.72 for defendant's use and occupancy of the premises through October 31, 1991 and the Clerk of this Court is directed to enter judgment in favor of plaintiffs accordingly and that plaintiffs recover use and occupancy in the per diem amount of $832.19 for every day from November 1, 1991 until defendant vacates the premises.

Dated: January 15 1992
New York, New York

/s/ Leonard B. Sand
U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 1/21/92.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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767 THIRD AVENUE ASSOCIATES, and SAGE REALTY CORPORATION, : 91 Civ. 4968 (LBS)

Plaintiffs, :

— against — : AFFIDAVIT

PERMANENT MISSION OF THE REPUBLIC OF ZAIRE TO THE UNITED NATIONS :

Defendant. :

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

MARCY KENT, having been duly sworn, deposes and says:

1. I am an officer of Sage Realty Corporation, plaintiff herein, and I make this affidavit in support of plaintiff's motion for summary judgment. I am fully familiar with all the facts and circumstances of this litigation and the relationship between the parties.

2. Plaintiff 767 Third Avenue Associates is a partnership which owns the building known as 767 Third Avenue (the "building)". Plaintiff Sage Realty Corporation ("Sage") is managing agent for the building.

3. On May 19, 1982, Sage Realty, as agent for the owner, entered into a written lease with defendant Permanent Mission of the Republic of Zaire to the United Nations ("Zaire Mission") for a term of ten years and one month commencing on June

21, 1982 for the entire 25th floor of the building (the "premises"). A copy of the lease is annexed hereto as Exhibit A. Pursuant to the lease, the Zaire Mission took possession of the premises on or about May 22, 1982, and remains in possession of the premises to this date.

4. However, by Judgment and Order of this Court, the lease was terminated on or about August 1989.

5. The Judgment was the result of an action between the same parties, premised on the same grounds – non-payment of rent. That action was commenced by summons and complaint in or about October, 1987 in the United States District Court for the Southern District of New York against the same defendant after it failed to make monthly rent payments for more than seven months. Judgment was entered in favor of plaintiffs and against defendant on August 22, 1989. The Judgment of this Court, by the Honorable Leonard Sand, terminated defendant's lease and all of its rights under the lease, awarded possession of the premises to plaintiffs, and awarded plaintiffs damages in the sum of $244,157.49 including costs and attorneys' fees. A copy of the Judgment is annexed hereto as Exhibit B.

6. After judgment was entered, defendant Zaire Mission paid the *full amount* of damages awarded by this Court, and with plaintiffs' consent, remained in possession as a month to month tenant, without a written lease, paying monthly use and occupancy in the fixed amount of $19,350.00 per month, together with additional monthly expenses, including electric charges, taxes on electric use porter's fees and real estate taxes.

7. Now, once again we are before this Court because defendant has fallen into default. Despite repeated demands, defendant has failed to pay the agreed upon use and occupancy to plaintiff for over *one year*, since August, 1990. Thus, there is now due and owing to plaintiffs unpaid use and occupancy from August 1990 through September 20, 1991 in the amount of $360,182.77. Use and occupancy charges continue to accrue.

8. After its repeated demands were ignored, Sage notified defendant by letter dated April 26, 1991, that its month to month

tenancy was to be terminated as of May 31, 1991 due to defendant's failure to cure its arrears. A copy of the April 26, 1991 letter is annexed hereto as Exhibit C.

9. Even after receipt of the April 26, 1991 letter of termination, defendant still failed to cure its default. Thereafter, by filing of the summons dated July 22, 1991, this action was commenced to recover the amounts owed and to regain possession of the premises.

10. In its answer, Defendant raised the affirmative defense of lack of personal jurisdiction due to insufficient service. However, defendant has conspicuously declined to state in what manner service on defendant was lacking. Contrary to defendant's unsupported assertions, plaintiffs' service fully complied with all statutory requirements. Defendant was served with both English language and certified French language translation copies of the Summons, Complaint and Notice of Suit, along with copies of this Court's civil cover sheet, Judges's rules and magistrate consent form. Moreover, service was made at the premises, the Zaire Mission to the United Nations, and upon a Zaire Mission staff member who identified herself as authorized to accept service. A copy of the affidavit of service is annexed hereto as Exhibit D. A copy of defendant's answer is annexed hereto as Exhibit E.

11. As for defendant's other affirmative defenses, I am informed by counsel that these defenses create no material issues of fact and that plaintiffs are entitled to summary judgment as a matter of law. Indeed, defendant does not allege that it has paid the sums owed or that plaintiffs have miscalculated the amounts due. Instead, defendant seeks to shield itself behind the Foreign Sovereign Immunities Act in order to avoid payment and remain in possession. As discussed more fully in the accompanying memorandum of law, the Foreign Sovereign Immunities Act does not permit a foreign country to enter into a commercial transaction, as here, the rental of commercial space, and then evade the consequences of a subsequent breach of its obligations by claiming immunity. Nor, was the Act intended to permit a foreign mission simply to appropriate private property and then cavalierly refuse to be held accountable.

WHEREFORE, plaintiff respectfully requests that plaintiff's motion be granted in its entirety, along with such other and further relief as this Court deems just and proper.

/s/
MARCY KENT

Sworn to before me this
10th day of October, 1991

/s/
Notary Public

ALTORAN, LISA I.
NOTARY PUBLIC, State of New York
No. 31-4881289
Qualified in New York County
Term Expires December 22, 1991

UNITED STATES CLAIMS COURT

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767 THIRD AVENUE ASSOCIATES and SAGE REALTY CORPORATION,

Plaintiffs,

-against-

THE UNITED STATES of AMERICA,

Defendant.

: Civil Action No. 92-398 L
: Judge Moody R. Tidwell
: AMENDED *COMPLAINT*

Plaintiffs 767 Third Avenue Associates and Sage Realty Corporation by their attorneys, Shea & Gould, for their complaint against the defendant allege as follows:

Nature of this Action

1. This action arises out of the United States' deprivation of plaintiffs' property in violation of the Fifth Amendment to the United States Constitution. As detailed herein, the United States has closed both the Consulate General of the Socialist Federal Republic of Yugoslavia (the "Consulate") and two branches of the Consulate, the Yugoslav Press and Cultural Center (the "Cultural Center") and the Yugoslav Chamber of Economy (the "Chamber of Economy"), has deprived plaintiffs of the benefits of their lease agreements with those entities, and has seized, for its own purposes, the premises formerly occupied by those entities and owned by plaintiffs.

2. These recent actions of the United States have been taken notwithstanding plaintiffs' expectation, based upon valid, existing international obligations of the United States to Yugoslavia and subjects of that nation, that the aforesaid leases would be

free from the very sort of governmental interference which resulted in these closures, and that the aforesaid premises were inviolable.

3. While plaintiffs were entitled to expect, in entering into the lease agreements, that the United States would abide by international obligations which the United States itself recognized, it is undoubtedly beyond the control of a private building owner to dictate the foreign policy decisions of the United States. Nor is this something that plaintiffs seek to do. Instead, plaintiffs seek only the enforcement of a simple maxim of the Constitution — when the United States sacrifices the property of one of its subjects in pursuit of its foreign policy objectives, it must pay that subject just compensation.

Parties

4. Plaintiff 767 Third Avenue Associates, a New York general partnership with its principal place of business at 777 Third Avenue, New York, New York, is the owner and lessor of the premises at 767 Third Avenue, New York, New York (the "Premises").

5. Plaintiff Sage Realty Corporation ("Sage"), a New York corporation with its principal place of business at 777 Third Avenue, New York, New York, is the agent for 767 Third Avenue Associates.

Jurisdiction

6. This Court has Jurisdiction under 28 U.S.C. § 1491 as this is a claim against the United States founded upon the Constitution.

The Lease Agreements

7. On or about February 6, 1981 Sage, as agent, entered into a written lease with the Consulate for a term which expired on August 31, 1991 for the entire 17th floor of the Premises. On or about October 28, 1991 an amendment and extension of lease

was entered into between Sage and the Consulate extending the term to August 31, 1996.

8. On or about February 6, 1981 Sage, as agent, entered into a written lease with the Cultural Center for a term which expired on August 31, 1991 for the entire 18th floor of the Premises. By letter agreement dated August 20, 1991, the term of the lease was extended to September 30, 1991. On or about October 21, 1991 an amendment and extension of lease was entered into between Sage and the Cultural Center extending the term to September 30, 1994.

9. On March 31, 1981 Sage, as agent for the Owners, entered into a written lease with the Chamber of Economy for a term which expired on or about August 28, 1991 for a portion of the 24th floor of the Premises (the 17th, 18th and 24th floor of the Premises are hereinafter the "Subject Premises"). On or about August 5, 1991 an amendment and extension of lease was entered into between Sage and the Chamber of Economy extending the term to August 31, 1996.

10. Under the terms of its lease the Consulate is required to pay in equal monthly installments fixed annual rent of $226,013 from September 1, 1991 through August 30, 1993; $230,625 from September 1, 1993 through August 30, 1994; and $239,850 From September 1, 1994 through August 31, 1996 along with any additional sums as defined in the lease in advance on the first day of each month.

11. Under the terms of its lease the Cultural Center is required to pay in equal monthly installments fixed annual rent of $226,013 from October 1, 1991 through September 30, 1993 and $230,625 from October 1, 1993 through September 30, 1994 along with any additional sums as defined in the lease in advance on the first day of each month.

12. Under the terms of its lease the Chamber of Economy is required to pay in equal monthly installments fixed annual rent of $97,500 from September 1, 1991 through August 31, 1993; $100,000 from September 1, 1993 through August 31, 1994; and $102,500 from September 1, 1994 through August 31, 1996.

13. At the time that Sage, as agent, entered into the aforesaid leases with the Consulate, the Cultural Center and the Chamber of Economy (hereinafter the "Leases"), the United States was obligated, under international treaties whose validity was recognized by the United States, not to interfere with the premises leased by the Consulate, Cultural Center and Chamber of Economy.

14. In particular, Article 22 of the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, (the "Vienna Convention"), provides, in relevant part:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

The United States is a signatory to the Vienna Convention.

15. Article VI of an 1881 convention between the United States of America and Serbia for Defining the Rights, Immunities and Privileges of Consular Officers, 22 Stat. 968 (annexed hereto as Exhibit A), which, upon information and belief, remains in effect as between the United States and Yugoslavia, similarly provides for the inviolability of Yugoslavian governmental premises in the United States:

> The consular offices shall at all times be inviolable. The local authorities shall not, under any pretext, invade them. In no case shall they examine or seize the papers there deposited.

16. Moreover, pursuant to the 1881 Treaty of Commerce Between the United States and Serbia, 22 Stat. 963, (annexed hereto as Exhibit B), Yugoslavian nationals, regardless of any governmental affiliation, are granted the rights of the subjects of most favored nations, *inter alia*, with respect to acquiring and possessing real property in the United States. For example, Article II of this treaty provides, in relevant part:

> In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

On information and belief, this treaty is still in effect as between the United States and Yugoslavia. Further, Serbia together with Montenegro, former states within the Socialist Federal Republic of Yugoslavia, have declared themselves to be the successors to, and are the likely successors to, the Socialist Federal Republic of Yugoslavia. Thus, the aforesaid convention and treaty with Serbia further remain in force and effect.

17. Based upon the foregoing treaties and conventions, as well as established canons of international law, plaintiffs were entitled to expect, at the time they entered into the Leases, that the Leases would be free from that very same interference by the United States which ultimately resulted in the closure of the Consulate, the Cultural Center and the Chamber of Economy and seizure of the Subject Premises.

Closure of the Consulate and Cultural Center

18. Notwithstanding its international obligations, the United States has selectively and arbitrarily ordered the closure of certain Yugoslavian governmental offices in the United States. Although the Yugoslavian consulate in Chicago, Yugoslavian Mission to the United Nations and the Yugoslavian Embassy in Washington, D.C. remain open, the United States recently ordered the closure of the Consulate, the Cultural Center, and

the Chamber of Economy, and the departure from the United States of all personnel associated with those entities.

19. Upon information and belief the Department of State of the United States notified the Consulate and the Cultural Center on or about May 25, 1992 that the Yugoslav Consulates General were to close immediately, and the Consulate and the Cultural Center were directed to terminate their operations in the City of New York at the close of business on May 31, 1992. Principal officers and military attaches were directed to depart the United States no later than midnight May 31, 1992; other members of the consular staff were directed to leave by midnight June 7, 1992. A copy of the notice from the Department of State is attached hereto as Exhibit C.

20. Upon information and belief, the Chamber of Economy was informed by the United States Department of State that the directives given by the Department of State to the Consulate and the Cultural Center applied to the Chamber of Economy as well.

21. By letters dated May 27, 1992 and May 28, 1992 the Consulate and the Cultural Center informed plaintiffs that they were terminating their leases as a result of the aforesaid action of the Department of State. A copy of the termination notices sent by the Consulate and Cultural Center are attached hereto as Exhibit D. The Chamber of Economy has also informed plaintiffs that it was terminating its lease as a result of the aforesaid action of the Department of State.

22. Thereafter, on or about July 9, 1992, agents of the United States Department of Treasury (the "Treasury Department") entered upon the Subject Premises and proclaimed that the Subject Premises were being seized by the United States. These agents of the Treasury Department further ordered that the locks on the doors of the Subject Premises be changed.

23. Before they departed, these agents of the Treasury Department posted a bulletin upon each floor of the Subject Premises which read, in relevant part, as follows:

THESE PREMISES HAVE BEEN CLOSED BY ORDER OF THE UNITED STATES DEPARTMENT OF THE TREASURY. . . .U.S. PERSONS ARE PROHIBITED FROM ENGAGING IN UNLICENSED TRANSACTIONS WITH THE ENTITY OCCUPYING THIS SPACE. ALL ASSETS OWNED OR CONTROLLED BY IT ARE TO BE TREATED AS BLOCKED.

NO ACCESS TO THESE PREMISES IS PERMITTED WITHOUT SPECIFIC AUTHORIZATION FROM THE OFFICE OF FOREIGN ASSETS CONTROL, U.S. TREASURY DEPARTMENT.

A copy of this bulletin is annexed hereto as Exhibit E.

24. Since this seizure, except to insure the safety of occupants and visitors of 767 Third Avenue and compliance with local building laws, the United States allows plaintiffs no access to the Subject Premises.

COUNT I

25. Plaintiffs repeat and reallege the allegations contained in paragraphs "1" through "24" with the same force and effect as if fully set forth herein.

26. The Leases and the income stream resulting therefrom are property within the meaning of the Fifth Amendment of the United States Constitution.

27. The Subject Premises are property within the meaning of the Fifth Amendment of the United States Constitution.

28. In furtherance of its foreign policy objectives, the United States has deprived plaintiffs of the aforesaid property.

29. By virtue of defendant's actions, plaintiffs are entitled to just compensation in an amount to be determined at trial, but in no event less than $2,044,401.67.

WHEREFORE, plaintiffs pray for a judgment against defendant the United States of America in an amount to be determined at trial, but in no event less than $2,044,401.67, together with the costs and disbursements of this action and such further relief as the Court deems just and proper.

Dated: New York, New York
August 3, 1992

/s/ Milton S. Gould

Milton S. Gould
Attorney for Plaintiffs
767 Third Avenue Associates
and Sage Realty Corporation
1251 Avenue of the Americas
New York, New York 10020-1193
(212) 827-3000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

767 THIRD AVENUE ASSOCIATES,
SAGE REALTY CORP.,

Plaintiffs,

v.

91 CIV. 4968
(LBS)

PERMANENT MISSION OF THE
REPUBLIC OF ZAIRE TO US.,

Defendant.

----------x

November 7, 1991
3:30 p.m.

Before:

HON. LEONARD B. SAND

District Judge

APPEARANCES

ROBERT WARD
Attorney for plaintiff

JEFFREY RUBIN
Attorney for defendant

(Case called)

MR. WARD: Your Honor, this is not the first time we've been before you on this matter.

THE COURT: I'm aware of that.

MR. WARD: In fact, the only way we were able to collect the last time, your Honor, was entry by your Honor of a judgment both for eviction and money damages. I have a feeling the same thing is happening now.

THE COURT: Suppose I hear from the defendant.

MR. RUBIN: Your Honor, I am Jeffrey Rubin. I did appear before you last time this matter was on. I think your Honor is fully aware of the problems involved here. The difficulty that the plaintiffs have in this specific case, unlike the other matter that was before your Honor, that your Honor rendered judgment on, is that the court is without in personam jurisdiction and that the service of the summons and complaint is fatally defective. They did not serve the host country.

The plaintiff's attorneys in their papers have tried to minimize that defect by saying that they substantially complied and they have cited cases to your Honor. However, all of their citations as best as I could see, and I haven't had an opportunity to read the cases themselves, I was just handed the papers in the court here, but all of those cases were cases in which the summons and complaint was served on the host country minimally. The other defects which were ruled to be really de minimis were that they were not translated, the summons was not translated, or it was not sent out by the Clerk of the Court.

THE COURT: And the court looks to the question of whether there was actual notice and whether there was any real prejudice which arises by virtue of the alleged —

MR. RUBIN: That's just my point, your Honor. It's our contention that the host country must be served and not just the mission here in the city. We believe that is the essence of the statute.

THE COURT: The plaintiff says that service was made on someone on the premises, a Zaire mission staff member, who identified herself as authorized to accept service.

MR. RUBIN: Accept service for the mission, not for the ministry of foreign affairs, which is the designated individual, the head of the ministry of foreign affairs as being the individual who must be served by statute, your Honor. And I believe the reason is a well-founded reason, in that the host country must be notified of a suit.

The last time I was before your Honor, in the Zaire case, I believe there was a default. I came in after the default was already in effect and they had served the host country in that case. In all other cases that I have ever been aware of the host country has always been served as they must be by statute.

The other issue that I believe is before your Honor, if your Honor rules there is jurisdiction, is that it's our contention that this court does not have subject matter jurisdiction as far as eviction is concerned. The statute is clear, as well as the Vienna Convention, that eviction cannot be ordered by this court. It certainly cannot be carried out. There cannot be an eviction of a foreign mission of the United Nations.

THE COURT: The statute speaks of execution, and you're using execution and eviction as synonymous.

MR. RUBIN: Synonymous, your Honor. If you are going to order eviction then you are saying that they can evict.

THE COURT: If you are ordering execution you are saying the property should be sold to satisfy my claim.

MR. RUBIN: We are saying, your Honor, that categorically there is no question as far as the statute and Vienna Conventions Treaty is concerned, a foreign mission to the United Nations cannot be evicted from their office regardless of the reason. If they are not paying rent the remedy lies with a political remedy of seeking redress in the State Department or in the United Nations of having this mission declared persona non grata and have them evicted in that manner.

The rationale is clear, your Honor. Not all countries in the world have independent courts, and if a country just decides to

evict through their courts a foreign nation from their embassy then that would be certainly easily complied with if the court is not independent.

THE COURT: Are you relying on the language of the statute?

MR. RUBIN: I'm relying on the language not only of the statute, your Honor, but of the Vienna Convention.

THE COURT: All right.

MR. WARD: Your Honor, would you like me to address both points? Your Honor, on the first point, that of jurisdiction, first off, your Honor, I don't think there is any doubt here there is no argument that we did serve the individual at the mission. She did accept the papers and she did say that she was authorized to accept those papers.

THE COURT: How was service effected in the prior case before me?

MR. WARD: Your Honor, I didn't handle the prior case. I'm afraid I'm unaware of how that was handled. It was another firm, your Honor.

I will say, your Honor, that we served the papers by hand on the mission, and immediately after our service, your Honor, opposing counsel here called us immediately to say he was representing Zaire.

In fact, this matter was first before Judge Conboy. We had had it transferred. Both parties requested that it be transferred to your Honor, because of the prior judgment, in August of 1989. But my opponents appeared before Judge Conboy. They put in the answers, your Honor. There is no prejudice. They had actual notice.

In addition, I apologize for having served our papers on the court this morning. We got the cross motion on Tuesday afternoon, your Honor, and we didn't have very much time, but we do point out a number of cases, I think the most appropriate of which is the *Banco Metropolitano*, a case of Judge Sweet of

this court, in which, your Honor, there was service not by the clerk, by the individuals and there was service on the mission, and Judge Sweet said, actual notice plus substantial compliance is enough. And I think, your Honor, that's all I have to say on that issue.

On the issue of the judgment, your Honor, Zaire is not contesting the court's subject matter jurisdiction to enter a money judgment. So I think that issue is not before the court.

On the issue of the eviction, the statutes do not say that this court has no subject matter jurisdiction on the issue of eviction. In fact, I think what the statute addresses is a judgment not by a landlord against a mission, but by a supplier or some other third party, and then that supplier or third party seeks to enforce the judgment by selling property. That cannot be done.

However, I can not believe, your Honor, that the Congress has decided here that missions such as Zaire can stay in the premises and not pay amounts of $360,000 in this case, $244,000 two years ago, your Honor, and that we have no remedy whatsoever.

MR. RUBIN: Your Honor, if I just may, the last time that this matter was before your Honor the service was sent, the service was complied with, they did send the summons and complaint to the ministry of foreign affairs in Kinshasa, which is the capital of Zaire.

THE COURT: The plaintiff's counsel alleges that after service was made at the mission that counsel called and said it was representing Zaire.

MR. RUBIN: Your Honor, we reserved our rights to raise the jurisdictional issue. In fact, we put it in our answer. We did not concede that there was jurisdiction in this court at any point in time. What we did was, the last time this case occurred there was a default, and we appeared merely to raise that issue in our answer. There was no waiver here of any jursidictional claim or lack of jurisdictional claim.

MR. WARD: Your Honor, not to belabor the point, but just one issue, and that is Mr. Rubin has told me a number of times that there is a civil war raging in Kinshasa. I doubt if my service of a document by registered mail would have given them much more notice than my service on the actual mission, your Honor.

MR. RUBIN: Your Honor, I just want to say to you that Mr. Ward seems to be representing not only what I said to him not in an accurate manner, but –

THE COURT: I'm going to disregard the last comment.

MR. RUBIN: I never said there was a civil war raging. I said there is a problem politically there, but the government is in firm control. The ministry of foreign affairs has remained where it's been for the last thirty years.

THE COURT: I'm a careful newspaper reader.

The following constitutes the order and judgment of the court on the motion by the plaintiff for summary judgment and the cross motion of the defendant to dismiss the action for lack of jurisdiction.

The court finds that there is personal jurisdiction over the permanent mission to the Republic of Zaire to the United Nations and that the court has subject matter jurisdiction.

Defendant challenges the personal jurisdiction on the grounds that service was made at the mission and was not made on the country itself.

The undisputed facts appear to be that service was made on a representative of the defendant at the mission, that is, upon a Zaire mission staff member who identified herself as authorized to accept service. Promptly thereafter, while reserving rights, including the right to contest jurisdiction, counsel made known his appearance and representation of the defendant. The significance of this is simply that there is no question that actual notice was accomplished.

The cases in this district look to the substance of service and the purposes behind it and have held that technical defects will

be disregarded when in fact there is actual notice and a lack of prejudice.

This case follows in the wake of a prior case before this court in which a judgment similar to the one sought here was entered by default. Defendant's counsel asserts that in that previous case service was made on Zaire and that distinguishes that case from this. The relevance of the previous case is not with respect to the method by which service was made, but simply to the fact that this is simply a later chapter in an ongoing issue with respect to the failure of the defendant to pay rent to the managing agent for the building acting on behalf of the owner of the property.

With respect to subject matter jurisdiction defendant asserts that under the statute and the convention which preceded its adoption, although a landlord may seek a money judgment it may not regain the premises by eviction of the tenant. We believe that this contention misreads the relevant statute. Although execution upon premises owned by a foreign sovereign and used for the purposes of its mission is precluded there is no prohibition with respect to eviction. The reason for this is clear. If a creditor of a foreign country could execute upon the premises owned by that country for mission purposes, then, indeed, there is a significant risk of circumstances developing which would interfere with foreign relations and relations with that country, circumstances quite different when one deals with landlord-tenant relationship.

If the defendant's contention is correct, then a landlord renting to a tenant who was a foreign mission would then be at the peril that not only would rent not be collected but that there would be an inability to regain occupancy of the premises. This was implicit in the court's prior grant of a default judgment against this defendant and is further supported by the decision of Judge Leval in York *Riverhouse v. The Pakistan mission to the United Nations*, 90 Civ. 2071, dated September 25, 1991.

Plaintiff's motion for summary judgment is granted. The defendant's cross motion is denied.

Submit order.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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767 THIRD AVENUE ASSOCIATES, and
SAGE REALTY CORP.,

Plaintiffs,

v. 91-4968

PERMANENT MISSION OF THE
REPUBLIC OF ZAIRE TO U.S.,

Defendant.

----------x

February 3, 1992
5:00 p.m.

Before:

HON. LEONARD B. SAND

District Judge

APPEARANCES

SHEA & GOULD
Attorneys for plaintiffs
JOSEPH FERRARO
ANDREW MESSITE

RUBIN & SHANG
Attorneys for defendant
JEFFREY M. RUBIN
DAVID C.Y. CHEUNG

ALSO PRESENT: M. CHINTA GASTON
GABRIEL W. GORENSTEIN
Assistant United States Attorneys

(In open court)

THE COURT: Let me trace the procedural history of this matter, as I understand it. And please feel free to call my attention to any errors that Imight make, because there have been a few cases, besides this one, before me, since the time of my rulings in this case.

My recollection of the matter is that there was a proceeding brought by the landlord for the collection of rent, and prior to the execution of any judgment, payment was made in full, and the matter was resolved. Sometime thereafter, the instant proceeding was commenced and various procedural objections were raised, which the court found to be without merit, and in opinion from the bench, the Court granted the plaintiffs' motion for summary judgment, and entered an order which was not explicit with respect to obtaining possession.

The Court heard nothing further about the matter, and assumed that as had occurred on the previous instance, the matter had been resolved. Thereafter, counsel for the landlord submitted a supplemental order, on January 31st, directing United States Marshal to physically remove the defendant from the premises. If he fails to vacate the premises on or before January 31st, 1992 -- no, that was not January 31st, that was on January 16th.

Again, the Court heard nothing further about the matter until last Friday, January 31st, when the Court received a letter from counsel for the defendant, apprising the Court that it wished a stay for purposes of appeal, and that the United States government would be expressing an interest in the matter and requesting a stay pending appeal. This was the first occasion that there was any such application made to the Court. The Court then entered an order staying the order of January 16th, pending this conference.

Is that an accurate recital of what has taken place? Don't be polite, I just want to make sure that I have the sequence of events clearly in mind.

I subsequently did receive a memorandum on behalf of the United States, which discussed the matter of eviction and urged a stay, and did not address any other aspect of the case. One of the points made by the United States is, and I'm looking at page 11 of the memorandum of the United States, under caption B, "There is no danger that a stay would inflict 'substantial' injury on the plaintiffs. Plaintiffs will be compensated for any injury they may suffer as a result of being unable to re-enter their property before January 31, 1992. In fact, this Court's order specifically provided for monetary damages in favor of the plaintiffs in the amount of $833.19 'for every day from November 1, 1991 until the defendant vacates the premises.' Thus, a stay will not 'substantially' injure the plaintiffs, who already have obtained the protection of a monetary judgment running in their favor for every day a stay is in place."

And I'm not sure I really understand what the United States was saying. If the United States is saying that it is making assurances to the plaintiff of the collectibility of the monetary judgment, then I would surely agree that there is no irreparable injury which the plaintiff would sustain, were a stay granted. But if the United States is not assuring collectibility and indeed is at the same time saying to the plaintiff landlord, although you have a monetary judgment, you may not do what a landlord traditionally does to protect itself -- that is, recover possession of the premises -- then I don't understand why irreparable injury would not exist. And I would appreciate some enlightenment from the United States as to just what its position is.

MS. GASTON: Yes, your Honor, my name is Chinta Gaston, Assistant United States Attorney, for the United States.

The United States is saying that this is not a traditional landlord tenant case and the landlord may not traditionally do what a landlord does -- that is, evict the Permanent Mission of Zaire from the premises. What was meant by this is that the plaintiff does have a monetary judgment which will continue to increase day by day, and in the event a stay is in place the monetary judgment will increase. Although the eviction is not

a remedy that is appropriate here, these cases are normally handled through diplomatic channels and efforts are under way at the State Department as we speak to resolve this.

THE COURT: My question to the government as to whether it was insuring collectibility was not merely a Socratic device.

MS. GASTON: The United States is not guaranteeing collectibility of the judgment.

THE COURT: I think this may be officious on my part but having had experience in my prior life -- that is, before becoming a judge -- with landlord tenant matters involving sovereignties, I think the United States should think long and hard before it says to a potential landlord of a mission or a sovereign, that even though there is a valid lease and there is no defense whatsoever for the nonpayment of rent, the owner of the premises will not be able to regain possession for a period of time which has no termination date, if you rent the premises to a foreign sovereign and the foreign sovereign fails to make rent payments, your only remedy is a judgment which you cannot enforce, and the hope that diplomatic means will be used to achieve payment.

I would think that such a rule would have a significant chilling effect on the willingness of landlords to rent premises to foreign sovereigns with a consequent reduction of the supply of such premises available for these purposes and an increase in the rents. Let me say this, I note that I decided this from the bench, and in significant reliance on Judge Leval's case. Are you familiar with Judge Leval's decision?

MS. GASTON: Yes, I am, your Honor. And I would just note procedurally that was a very different posture from this case. He simply ruled there, I believe it was under the Vienna Convention that the prohibition against attachment or execution was not relevant there because it was a motion to dismiss and did not apply to the maintenance of a suit. Whereas here, you ruled on summary judgment in favor of the plaintiffs and actually ordered a physical eviction. And so I don't believe Judge Leval reached the issue in that case.

THE COURT: It's clear if you're a vendor to a foreign government or some other creditor of a foreign government, you cannot execute a levy on the property of the foreign government. I think the Second Circuit said that in the case involving the Chilean airlines, where a tort judgment creditor of Chile attempted to attach a Chilean airline plane. But we're dealing with a different circumstance here. We're dealing here with a landlord who not only is owed money, but who is being denied the opportunity to cut his losses and relet the premises, which leads me to my next question. And that is: What recourse, if any, does the plaintiff have in your view, having obtained a monetary judgment? Is there any legal remedy now available to the plaintiff to regain the premises?

MS. GASTON: There is no legal remedy available to the plaintiff to evict the Permanent Mission of Zaire from its premises. Under the international treaties to which the United States is bound, it's bound to protect the inviolability of those premises and in its treatment of diplomats abroad, it relies on those treaties for the treatment of its diplomats abroad.

THE COURT: You are telling me that as you read the treaties, which use different language -- they use language of execution, or -- I forget just what the terms are

MS. GASTON: Execution and attachment.

THE COURT: Execution and attachment, you're saying that you read execution and attachment to mean that a landlord, having let premises to a foreign sovereign, has no legal means of regaining possession of those premises?

MS. GASTON: Well, I'm not relying solely on the language in the treaties referring to execution and attachment. I'm also relying on the language in those treaties which impose upon the United States the legal obligation to protect those premises as inviolable. For example, the United Nations Charter says representatives of the United Nations shall enjoy such duties as --

THE COURT: I read the papers and I understand that. And I also understand it in terms of protection of the papers and in terms of making arrangements so alternate quarters can be found and so on. There are a great many things that can be done here, but the bottom line -- and I think it's very significant and I find it quite novel -- is that you're saying that a landlord who lets premises to a foreign sovereign has no legal means of ever obtaining possession of those premises, no matter how clear it is that the rent is not being paid or perhaps will never be paid.

MS. GASTON: The Executive branch is the branch of the government that, through diplomatic channels, has in the past -- and will in this case -- resolved the problem.

THE COURT: That's what I thought was happening, and that's what I think perhaps the plaintiff thought was happening. But, may I suggest -- again, perhaps is an officious suggestion -- but I think a decision by this Court, or a decision by the Second Circuit, which says, potential landlords in the Second Circuit be on notice that that right which is generally regarded as the fundamental right of a landlord, which is to regain possession of a premises, will not be available to you, is not in the best interests of the United States. And my hope would be, and I'm sure the plaintiffs are interested in recovery of the moneys owed them, whether, if they were paid in full they would be agreeable to permitting the defendant to remain in possession, perhaps with some greater assurances, is something I can't speculate about. But I would really think that a consentual resolution of this would better serve everyone's need than a resolution, which, if favorable to the defendant, I think significantly impedes future rentals of properties to foreign sovereigns.

MS. GASTON: I would just like to add that while that may well be, eviction of the Permanent Mission of Zaire onto Third Avenue is also going to impede the business of the United Nations.

THE COURT: There is nothing which stops the United States from making other arrangements for the housing of this mission.

But you see what is happening is the burden of the government's interest is being placed solely on one plaintiff who made the mistake or had the misfortune of renting to the foreign sovereign without invoking some of the other means which landlords sometimes do to protect themselves. But, I mean, if you're saying to me that all that the United States can do is say to the mission, you should really pay the landlord, I don't accept that.

MS. GASTON: Well, that's not all the United States can do. If at the bottom line the United States could declare a mission persona non grata and evict them from the United States --

THE COURT: I don't know what other financial arrangements exist between the United States and Zaire, but it doesn't take much imagination to think of how funds could be earmarked and other things could happen. But nothing happened, nothing happened for the several weeks when this order was in place.

Now, if any of what I've said makes any sense or has any appeal, my next inquiry would be, assuming that there are other things that the United States could do, what do you believe is a reasonable period of time for that to be played out?

MR. RUBIN: Your Honor, I think I should speak on that, being the attorney for the mission.

THE COURT: You're Mr. Ward?

MR. RUBIN: Rubin.

Your Honor should be aware that the ambassador of the mission, in the interim period of time that this case was decided by your Honor and today, has been appointed as, I believe it's the Secretary of Interior, or Foreign Affairs of the country Zaire. He's no longer the ambassador, the country at the present time is awaiting a new ambassador to be appointed.

The former ambassador has informed me prior to his leaving his post and going back to Zaire that he would personally

see that this matter was resolved. In the hopes that that would have taken place, we had relied on --

THE COURT: I have a feeling of deja vu here.

MR. RUBIN: That's a correct feeling, your Honor, I think I have made that representation previously.

My hesitancy in making representations to the Court is that the ambassador is told one thing by his country which he informs me I should relate to the Court and something entirely different occurs. As your Honor is aware just by reading the paper, what is going on in Zaire right now is akin to a revolution. Their entire political stability is in question. Whether they are placing this issue on a list of priorities which would put it near the top remains somewhat in doubt as far as I personally am concerned. I think they are more concerned with the preservation of the the government, unfortunately, than dealing with this situation.

But the ambassador is aware of the problems that he personally faced while he was in the city, and the country has not only with this landlord but with other landlords as well, and that he is trying to at least resolve this problem. So, with the extra pressure that is being applied on Zaire by the State Department presently, I would hope that the matter could be resolved sooner than later.

As far as the time frame is concerned, I would not even venture a guess as to when this matter would specifically be resolved.

THE COURT: I thank you for your candor.

MR. RUBIN: I don't think anyone could represent anything other than that, your Honor, without knowing firsthand by speaking to the president of the country. But as far as the mission is concerned, and as far as my speaking to the people who I've spoken to at the mission, as well as ambassador, they are attempting to resolve this as soon as they could. The ambassador just left in January, hopefully, the matter will be resolved very quickly, but a specific time I cannot give.

MS. GASTON: Your Honor, if I may speak to that, I also could not offer any particular time frame for resolving the problem, but the State Department did represent to me that the situation in Zaire has improved over what it was several months ago, and they have been able to step up efforts as a result of having someone they can send our diplomats to to put pressure on.

What I would propose would be a 30-day stay of your order with the ability to come back and ask for an extension for good cause. I'm not suggesting that -- I don't have any knowledge that the problem can be resolved in 30 days, I'm not saying that, but I was just throwing that out as a bench mark.

THE COURT: And your client is the State Department, at this point?

MS. GASTON: Well, yes.

THE COURT: So far as you know, is this a matter of first impression in terms of the ability of the landlord to regain possession?

MS. GASTON: I can tell you that I'm not aware of any specific case law on the subject, otherwise I would have put it in the statement of interest. And I can also tell you that it appears to be a matter -- no one is aware of either any type of embassy or any permanent mission having been evicted in the past. That includes both State Department officials and the United States Marshals. There are, however, numerous situations where this problem has been resolved favorably through diplomatic measures.

THE COURT: All right, suppose I hear from the parties.

MR. FERRARO: Your Honor, Joseph Ferraro, on behalf of the plaintiff.

I don't think I can add anything to what your Honor said about the irreparable harm that will come to the plaintiff if your Honor grants a stay pending appeal under circumstances

where the plaintiff has no assurance from the U.S. government or the Zairean government that it will be paid, and under circumstances in which both the defendant and the U.S. government take the position that the plaintiff has no way of enforcing a judgment.

The position that the United States has taken in its statement is somewhat inconsistent and I think your Honor just pointed out that inconsistency. They say that the plaintiff will be compensated, and yet they say that they are not guaranteeing collectibility. Nor do they believe that if there is a larger judgment than there is now, any part of it can be collected through remedies that can be imposed by the Court.

THE COURT: Suppose that there is a change in the government, I hesitate to —

MR. FERRARO: You mean the government of Zaire, your Honor.

THE COURT: The government of Zaire.

MR. FERRARO: The fact that counsel has submitted that the situation in Zaire is unstable certainly does not fill me with confidence that the U.S. government's assurances that we will be paid can be given much credence.

There is one thing I would like to add with respect to the irreparable harm to the defendant, your Honor. I think that there is a sense in which whatever harm may come to the defendant through the enforcement of this judgment of possession is to some extent self-inflicted. Your Honor, we started this case after having given notice to terminate the tenancy back in July. Your Honor granted summary judgment in November. Your Honor signed an order and a judgment in November, which did not contain an explicit time by which they had to vacate, but your Honor did sign a judgment granting possession in November. Your Honor signed another one which was very explicit on January 16th.

I heard counsel say something about troubles with other landlords in the city. I don't know if this the only space that Zaire has, but certainly in the time that we've been proceeding with this case, Zaire could have looked for and found other space. They seem to take the position that they're entitled to stay here forever without paying rent, and I really don't think that the landlord can accept that. I think that to the extent that they are harmed by having to move out, that harm is largely caused, first, by their failure to pay rent, and secondly, by their failure to find other premises, given the New York City real estate market that they have had available to them.

THE COURT: As a practical economic matter, isn't the more likely method by which your client may be made whole for past rent as well as for the present use and occupancy of the premises through the offices of the government, rather than as a matter of enforcement of a judgment?

MR. FERRARO: Well, your Honor, the enforcement of the judgment that your Honor has already signed does not enable us to collect back rent, but it certainly does enable us to cut our losses and to attempt to relet the premises. The use and occupancy which your Honor has granted is in the amount of approximately a little over $25,000 per month, so as long as Zaire continues in possession, without paying rent, without paying either the back rent or present use and occupancy, we're losing that much money.

THE COURT: Mr. Rubin.

MR. RUBIN: Your Honor, where counsel for the plaintiff claims that it is self-inflicted, or the penalty is somewhat self-inflicted on Zaire, I just might point out that the Vienna Convention is eminently clearly. The language of the Convention says, "The premises of a mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission."

THE COURT: Yes, and isn't what's clearly in mind there that you can't search and seize. And if you have to, when they talk about agents of the receiving state, aren't they really talking

about governmental intrusions on the integrity of the premises? That's a far cry from a landlord giving a tenant adequate notice, adequate time to remove any secret or other documents or possessions or so on. Isn't that what the Vienna Convention is concerned with?

MR. RUBIN: Your Honor, the Vienna Convention says, "agents of the receiving state."

THE COURT: Yes.

MR. RUBIN: Your Honor has directed that the United States Marshals, who are clearly agents of the receiving state, and as far as the landlord is concerned, every landlord, your Honor made a very good point by saying isn't it true that it might harm the interests of the United States if we say that a foreign mission may occupy premise, not pay rent, but remain there.

Well, that is true, it certainly wouldn't help the situation in New York, where it's necessary for foreign states to gain offices and office space for their missions, whether they are counselors, or whether they are missions of the United Nations. However, every landlord knows or should know — certainly this landlord who rents not only to this foreign state, but there are many other foreign states — knows that they cannot evict a tenant who is a foreign state. And they know going in that one of the problems they may encounter in renting to foreign states is just this problem, and it is a problem that does not just come up when they don't pay rent. They know when they sign a lease. In fact, if the foreign mission waives its diplomatic immunity in a lease, another issue is presented, whether or not that waiver can mean that a foreign state, the receiving state, can go and enter and evict.

However, in this case, it is my contention that, No. 1, the remedy available, as Ms. Gaston pointed out to your Honor, is not a legal remedy, unfortunately. It's a remedy that is a political remedy or diplomatic remedy that can only be achieved by the Executive branch of governments trying to get from the mission the money for the landlord. That is the only remedy that

I am aware of. Unfortunately, there is no legal remedy. And fortunately for United States embassies overseas and countries which do not have the due process safeguards that this country has, the Vienna Convention is in place, because that is the purpose of the Vienna Convention, to protect. And the reason this country signed it, as far as I know, was to protect our own embassies from some judge in that country saying you can enter and evict because you have some landlord-tenant dispute.

So the reason for the Convention is clear, it's to protect our own embassies. The solution for plaintiffs' problem, unfortunately for them, lies in a diplomatic or political solution where your Honor may order a judgment as your Honor has done here. That is really the first step that is, from my understanding, necessary to put in place the State Department's procedures here in trying to collect the money or trying to even ask the mission to find other premises.

THE COURT: Anything else, Ms. Gaston? I'm going to grant the stay because I believe that the question raised is a very serious question, which has great public interest ramifications. And I want further briefing and argument because I think that the matter has not yet been fully aired before me, having learned of the government's interest and position on this matter, only on Friday.

I'm going to want not only exhaustive briefing on the legal issue, as well as the history of the conventions, but what other precedents there exist with respect to the treaty interpretations. I also want to know what alternatives exist, what other premises are occupied by divisions or agencies of Zaire, whether these leases are in good standing or not. I do think that the United States, having expressed an interest in this matter and having taken the position which it has, has a very heavy responsibility, not only to the Court, but to the entire situation, so that the entire burden of dealing with the unsettled conditions in Zaire is not thrust on the shoulders of a single landlord. I find it difficult to believe, given the nature of the government and relations between governments, that there are not things that the

United States can do here to alter the priorities which may presently exist in the mind of the ambassador or those to whom he reports.

Now, what is the minimum period of time that is required – my question is primarily directed to the United States, but to the others as well – the minimum period of time required to brief the matter before this Court?

Ms. Gaston, two weeks?

MS. GASTON: Your Honor, it is a tall order, the history of the conventions, the legal issues.

THE COURT: I assume that before the United States walks into this courtroom and takes a position, it does so, or at least some representative of the government, having given the matter some thought.

MS. GASTON: I didn't mean to suggest that I hadn't, your Honor.

THE COURT: Yes

MS. GASTON: I would propose two weeks.

THE COURT: Two weeks. I'll have simultaneous briefing from all parties two weeks from today. I will stay implementation of my previous orders pending further order of this Court.

MR. FERRARO: Your Honor –

MR. RUBIN: Thank you, your Honor.

MR. FERRARO: May I ask, if you're staying the implementation of your Honor's order without date, that you impose a bond during that period of time.

THE COURT: Let me hear from the parties on this.

MR. RUBIN: Your Honor, we had discussed the bonding issue. It's my contention that if a bond could be posted, the rent would have been paid. The deal with the people –

THE COURT: That may be, but now we're on a different subject. Now we're on the subject of a bond.

What is the position of the United States with respect to whether a landlord – let me just finish the question and I'll give you a moment to confer – whether a landlord who has a monetary judgment but who has, in the views of the United States, no other legal means of enforcement, is entitled to a bond. Ms. Gaston?

MS. GASTON: Mr. Rubin has represented to the Court that they're not in a position to pay the bond.

THE COURT: That's not my question to you. My question to you is not the fiscal condition of the government of Zaire. My question to you is from the standpoint of the United States, which has now taken a position with respect to the interpretation of the Vienna Convention, whether there is any legal impediment to the Court imposing a bond.

MS. GASTON: If the Court imposes a bond and Zaire does not pay the bond, then no stay would be in place and we're right back to square one. So if the Court is not inclined – the Court has granted a stay and if the Court were to impose this bond as a monetary judgment, and Zaire was not able to pay it or did not pay it because of the political turmoil in Zaire and a stay were not in effect, then, your Honor, the goal here would not be accomplished.

THE COURT: I'm having a little difficulty in determining what is the goal. If the goal is to give Zaire absolute immunity from any of the protections which are normally accorded to a landlord creditor seeking to retain possession of the premises and collective judgment, if that's the definition of a goal, then you're quite correct.

MS. GASTON: No, your Honor, the goal of the United States is to prevent the eviction of the Permanent Mission of Zaire because the United States is under legal obligations under the United Nations Charter and the Convention of Privileged Immunities and the Vienna Convention. That's the goal of the United States, and if your Honor does not impose a stay because Zaire cannot or does not pay a bond, then we're right back where we started when we came in here today. That was my point.

THE COURT: I intend nothing personal by this comment, I understand that counsel are instructed by their client, but is the United States or the Court simply to take at face value, without more, the statement that Zaire cannot afford to post a bond?

MR. RUBIN: Your Honor, if I just may interrupt at this point, my statement was that if the bond becomes an issue, it's not that they cannot afford to pay this money. In fact, I was personally told by the ambassador that they do intend to pay the money. What I said is that is a bond becomes an issue where they would have to post a bond, they would just as soon pay the rent if we can get the money here to pay the rent.

THE COURT: That would make everybody happy.

MR. RUBIN: That's very true. The only thing I can say about the bond is that the Zairean government, at least the representatives of the Zairean government that I have spoken to, have informed me that they intend to pay this money. So if we're talking about a bond, if that's what your Honor would take as a bond, that Zaire does promise to pay the rent, then that's the only thing they can offer.

THE COURT: We have two facts, we have the past and the future. And obviously obtaining the premises looks to the future, because we have a situation here where at the rate of some $800 a day, the plaintiff's damages are increasing. Would the plaintiff be interested in a bond solely with respect to future use and occupancy? That might not be in the plaintiff's best interests, but that's for the plaintiff to decide.

Do you understand what I'm saying?

MR. FERRARO: Yes, I do, your Honor. But that, in effect, would give the defendant a license to stay there forever, as long as it pays future use and occupancy and never pays the past rent, so I think that that would not be adequate.

THE COURT: I'll defer on the issue of bonding, and please address it in your briefs due two weeks from today. The only grounds on which I will grant an adjournment of the two-week briefing period is if all the parties represent to me that the matter is on the brink of a complete consensual resolution. All right, now do we need a written order extending the stay, or does counsel represent that no action will be taken to implement the order permitting eviction until further order of this Court?

MR. FERRARO: Your Honor, we don't need a separate written order, but we'll get the transcript and I think that that will be adequate.

THE COURT: Very well. Thank you.

MR. RUBIN: Thank you, your Honor.

MS. GASTON: Thank you, your Honor.

MR. FERRARO: Thank you.

STATUTORY PROVISIONS

Foreign Sovereign Immunities Act

28 U.S.C. § 1603. Definitions

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference of its purpose.

28 U.S.C. § 1605. General Exceptions to the Jurisdictional Immunity of A Foreign State

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

1. In which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

2. In which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

3. In which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

4. In which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

* * *

28 U.S.C. § 1609. Immunity From Attachment and Execution of Property of A Foreign State

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the Immunity From Attachment or Execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

1. The foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

2. The property is or was used for the commercial activity upon which the claim is based, or

3. The execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

4. The execution relates to a judgment establishing rights in property –

A. Which is acquired by succession or gift, or

B. Which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission.

* * *

TREATY PROVISIONS

Article 22 Of The Vienna Convention

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.